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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 250.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL
AND JUNE, 1911, AND CASES WHEREIN REHEARINGS WERE
DENIED AT THE JUNE AND OCTOBER TERMS, 1911.
ALSO PROGRAM OF EXERCISES ACCOMPANYING THE UNVEILING OF
PORTRAITS OF FORMER SUPREME COURT JUSTICES.

SAMUEL PASHLEY IRWIN,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1911.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

ALONZO K. VICKERS, CHIEF JUSTICE.

ORRIN N. CARTER, CHIEF JUSTICE.*

JAMES H. CARTWRIGHT,	}	JUSTICES.
JOHN P. HAND,		
WILLIAM M. FARMER,		
ALONZO K. VICKERS,		
ORRIN N. CARTER,		
FRANK K. DUNN,		
GEORGE A. COOKE,		

ATTORNEY GENERAL,

WILLIAM H. STEAD.

REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

CLERK,

J. McCAN DAVIS.

*Mr. Justice Carter became Chief Justice at the June term, 1911.



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UNVEILING OF PORTRAITS.

On Thursday, February 16, 1911, the portraits of the former justices of the Supreme Court were unveiled, with appropriate exercises, in the Supreme Court room before a large and appreciative audience of lawyers and laymen. Upon the convening of court at 2 o'clock P. M. Mr. Chief Justice Vickers, speaking for the court, said:

Soon after the Supreme Court removed from its old quarters in the State House to its new and permanent home in the Judicial Department Building, the desirability of procuring portraits of all persons who had been members of the court, other than those now in service, to be placed in some suitable place in this building, was the subject of frequent informal discussions among members of the court. While all agreed that if such portraits could be obtained it would be the surest means of preserving, in connection with the judicial history of the State, a memory of the personnel of the men who had made that history and an appropriate expression of the debt of gratitude which the present generation owes to them, still the task of assembling correct likenesses of so many men whose years of activity were distributed through the entire history of the State seemed almost an impossible undertaking. A committee was appointed for the purpose of making an effort to collect the pictures. After much labor and correspondence the committee finally procured the pictures of all of the judges with the single exception of Chief Justice Joseph Phillips, who was appointed chief justice October 9, 1818, and served until July 4, 1822. Up to this time we have been unable to procure his portrait.

After it was ascertained that the undertaking was to be in a large and unexpected degree successful, it was thought that the unveiling of these portraits should be made an event of a public nature, in which members of the bar of the State should be in-

vited to participate. Recognizing the efficiency of the State Bar Association in managing public functions of this character, as well as the propriety of such a course, it was decided to place the whole matter in the hands of the officials of that association. They cheerfully accepted the duty and assumed the responsibility of calling this meeting, and I feel very sure that when we have concluded the program which has been arranged by the association, all will agree that the association has maintained its reputation for doing all things well which it undertakes.

It is my pleasure, on behalf of the court, to welcome you one and all to this meeting. We sincerely hope that you will feel that this is your meeting, and that you will enjoy not only the public addresses that are to follow, but that you will also enjoy and improve the opportunity thus afforded of renewing old friendships and of forming new ones. The regular call of the docket for the day has been set over until to-morrow. The court is not in session except for the purpose of carrying out the part of the program assigned to it. We hope that you will enter into the spirit of this occasion and enjoy it to the utmost; and I think I do not in the least imperil the dignity of the court when I say that, if necessary for your pleasure, a general immunity order from punishment for contempt will be entered, so that you may be unrestrained in the pleasure of this occasion.

The committee in charge of the program for the exercises which are to follow has very appropriately divided the history of the court into three epochs and assigned a speaker to the period under each of our constitutions. We will now be addressed by Judge Edward C. Kramer, of St. Clair county, on the subject of "The Supreme Court under the Constitution of 1818."

Mr. Kramer spoke, in part, as follows:

The constitution of 1818 provided that the judicial power of the State should be vested in one Supreme Court and such inferior courts as the General Assembly should from time to time ordain and establish. It provided that its sessions should be held at the seat of government; that it should have appellate jurisdiction only, except in cases relating to the revenue, in cases of *mandamus*, and in such cases of impeachment as might be required to be tried be-

fore it; that the court should consist of a chief justice and three associates, with a provision that the number of justices might be increased by the General Assembly after the year 1824. It provided that the justices of the Supreme Court and the judges of the inferior courts should be appointed by joint ballot of both branches of the General Assembly and commissioned by the Governor, and hold their offices during good behavior until the end of the first session of the General Assembly which should be begun and held after the first day of January, 1824, at which time their commissions should expire; and until that time the justices of the Supreme Court should hold circuit courts, but after that time the justices of the Supreme Court should be commissioned during good behavior and should not hold the circuit courts unless required by law. The salaries of the first judges were fixed at \$1000. It provided that the judges thereafter appointed should have adequate and competent salaries, which should not be diminished during their continuance in office.

The first General Assembly of the new State met at Kaskaskia on the 5th day of October, 1818, and on the 9th day of October selected our first Supreme Court by appointing Joseph Phillips chief justice and Thomas C. Browne, John Reynolds and William P. Foster associate justices. Under the provisions of the constitution they were to hold their respective offices until the end of the first session of the General Assembly which should be begun and held after the first day of January, 1824. William P. Foster, on the 7th day of July, 1819, resigned his position as associate justice, and William Wilson was on the 7th day of August, 1819, appointed to succeed him. Chief Justice Phillips, on the 4th day of July, 1822, resigned his position to become a candidate for Governor, and Thomas Reynolds was on the 31st day of August, 1822, appointed to succeed him. The court as thus constituted continued until the convening of the first session of the General Assembly which met after the first day of January, 1824. On the 30th day of December, 1824, the General Assembly appointed William Wilson chief justice, Thomas C. Browne, Samuel D. Lockwood and Theophilus W. Smith associate justices, who were all commissioned January 19, 1825. The court as thus constituted continued until 1841, when the number of associate justices was increased to eight.

The General Assembly of 1824 provided that the Supreme Court should perform appellate duties only, and reduced their salaries to \$800 per annum. An act was passed dividing the State into five judicial circuits and judges were appointed to hold the circuit courts. In addition to the judicial duties of the Supreme Court the judges were directed by the General Assembly to prepare a revision of the laws and report to the next General Assembly. It was found, however, that the duties thus imposed upon the supreme judges were not sufficient to occupy their time and the people felt that they were not earning the salaries provided for them. During this time there were many exciting political questions before the people. The circuit judges took a lively interest in their settlement, and the people felt that they permitted their interest in these questions to affect them in the discharge of their judicial duties. For these reasons the circuit courts became unpopular, and the General Assembly, on the 12th day of January, 1827, repealed the act creating the circuit courts and again required the supreme judges to perform circuit duties and increased their salaries to \$1000 per annum. The supreme judges performed the circuit duties until the 7th day of January, 1835, with the exception that on the 8th day of January, 1829, the General Assembly appointed a circuit judge to aid them in holding circuit court and fixed his circuit north of the Illinois river.

On the 7th day of January, 1835, the General Assembly passed an act relieving the justices of the Supreme Court from circuit duties and appointed other judges to hold the circuit courts. This condition continued until the 10th day of February, 1841, when the General Assembly repealed all former laws authorizing circuit judges to hold the circuit courts and appointed five additional associate justices of the Supreme Court and again required the judges of this court to perform the circuit duties. This system continued until the adoption of the constitution of 1848. The five additional associate justices appointed were Thomas Ford, Sidney Breese, Walter B. Scates, Samuel H. Treat and Stephen A. Douglas, who were all commissioned February 15, 1841. They, with Chief Justice Wilson and Associate Justices Samuel D. Lockwood, Thomas C. Browne and Theophilus W. Smith, constituted the court. William Wilson continued as chief justice, holding his office until the adoption of the constitution in 1848. Samuel D.

Lockwood, Thomas C. Browne and Samuel H. Treat continued as associate justices until 1848. Thomas Ford, on the first day of August, 1842, resigned on his election as Governor of the State. John D. Caton was on the 20th day of August, 1842, appointed by the Governor to succeed him, and continued in office until the 6th day of March, 1843, when John M. Robinson was appointed by the General Assembly, who continued in office until the day of his death, April 27, 1843. On the second day of May, 1843, John D. Caton was re-appointed by the Governor to succeed Justice Robinson, and on the 17th day of February, 1845, he was appointed by the General Assembly and continued in office until 1848. Sidney Breese on the 19th day of December, 1842, resigned as associate justice on his election to the United States senate, and James Semple was on the 16th day of January, 1843, appointed by the General Assembly to succeed him and continued in office until August 16, 1843, when he resigned, and on the same day James Shields was appointed by the Governor to succeed him, who continued in office until the 2d day of April, 1845, at which time he resigned and Gustavus Koerner was appointed by the Governor to fill the vacancy thus occasioned. Justice Koerner continued in office under this appointment until the session of the General Assembly in 1845-46, when he was appointed by that body and continued in office until 1848. Theophilus W. Smith resigned his position on the 26th day of December, 1842, and on the 4th day of February, 1843, Richard M. Young was appointed by the General Assembly to succeed him and continued in office until January 26, 1847, when he resigned, and Jesse B. Thomas, on the 27th day of January, 1847, was appointed by the General Assembly and continued in office until 1848. Stephen A. Douglas, on June 28, 1843, resigned, and Jesse B. Thomas was on the 6th day of August, 1843, appointed by the Governor to succeed him. He continued in office under this appointment until August 8, 1845, when he resigned, and Norman H. Purple was appointed by the Governor to succeed him. Justice Purple continued under this appointment until December 19, 1846, when he was appointed by the General Assembly and continued in office until 1848. Walter B. Scates, on January 11, 1847, resigned and was succeeded by William A. Denning, who was appointed by the General Assembly on the 19th day of January, 1847, and served until 1848.

It thus appears that William Wilson was chief justice, Thomas C. Browne, Samuel D. Lockwood, Samuel H. Treat, John D. Catton, Norman H. Purple, Gustavus Koerner, William A. Denning and Jesse B. Thomas were associate justices at the time of the adoption of the constitution in 1848. These pioneers of the law blazed the way and laid the foundation of our jurisprudence. For the manner in which they discharged their duties, the bench and the bar of to-day owe them a debt of gratitude.

Some lawyers of the present time undertake to minimize the work of our early judges by contending that the matters submitted to them for determination were unimportant and of no great concern. This is a mistaken idea. It is true that the amounts involved were not so great as in later litigation but the principles were the same, and it should be borne in mind that these early judges were engaged in formulating and laying down principles of law. Complaints are often made that their opinions are too short, and that this indicates that they did not measure up to the standard of the later judges. No just, unfavorable criticism can be passed upon them or their work on this account. Our early judges had but few precedents to cite,—in fact, they were employed in precedent-making. Their decisions, in the main, were clear and concise statements of legal principles, and are, as a rule, maintained as the law to this day. Their opinions are reported in the first nine volumes of the Supreme Court Reports. They include Breese's report, the four Scammon reports and the first four Gilman. These volumes may well be called the foundation upon which our judicial system is constructed. They contain 1178 reported cases, many of which involved and settled important matters. Many important provisions of the constitution were construed. Some of them so engrossed the people that they were not easy of solution. The slavery question, ever a burning issue, gave them no little trouble. The constitution, notwithstanding the provisions of the ordinance of 1787, permitted the indenturing of servants. This fastened upon the people a system of limited slavery, and the status of indentured servants and their children had to be fixed. While the Federal fugitive slave laws had to be observed, yet the rights of a slave voluntarily brought within the borders of the State had to be determined long before the Dred Scott decision. It was during these exciting times that Elijah P. Lovejoy was

assassinated at Alton. The Mormon troubles gave them no little concern. Joseph Smith, the Mormon prophet, and his brother, Hiram, were assassinated. The Black Hawk war occurred during this period. The Indian, while he remained, was always troublesome, and yet he had rights that had to be protected. The people kept themselves worked up to a high tension on these questions, and it was worth the political life of a judge to decide many of these matters when they found their way into the courts, but it can be said for the supreme judges, that as a rule they measured up to the situation and decided these political questions, as they did all others, without fear or favor.

The Supreme Court of the State of Illinois has always stood high in the estimation of judges of other States, and it was such judges as Wilson, Lockwood, Breese, Caton, Treat, Scates, Koerner, Purple, and others that we have here mentioned, that caused it to take a high rank in the beginning.

"The Supreme Court under the Constitution of 1848" was the subject assigned to Mr. S. S. Gregory, of Chicago, who spoke, in part, as follows:

I am not certain that the mere dry statement of what, if not familiar, is at least accessible to all, possesses much of interest for an occasion of this character, yet perhaps some such outline is necessary; and besides, it may afford a kind of compendious view of the changes in the constitution and membership of the court that will suggest and recall to the older members of the profession and those familiar with the history of our State much more than is here set down.

By section 2 of article 5 of the constitution of 1848 it was provided that the Supreme Court should consist of three judges; by section 3, that the State should be divided into three grand divisions and that one judge should be elected from each division; by section 4, that the office of one of the judges should be vacated after the first election held under that article in three years, of one in six years and one in nine, this to be determined by lot, so that one judge should thereafter be elected every three years for the full term of nine years. The first election was held September 4, 1848, the second in June, 1852, and the regular time for the elec-

tion was every three years thereafter. The constitution provided that the terms of the judges first elected should begin on the first Monday of December, 1848, but made no provision as to the six months between December and June. This was covered by an act of the General Assembly declaring that the judges should continue in office until their successors were elected and qualified.

At the first election Judge Caton and Judge Treat, who were members of the court, and Lyman Trumbull, were elected from the third, (afterwards the northern,) the second, (afterwards the central,) and the first, (afterwards the southern,) grand divisions, respectively. Judge Treat was by lot selected for the full term of nine years, Judge Caton for six and Judge Trumbull for three. The new court convened for the first time at Mount Vernon in December. Judge Trumbull resigned as of July 4, 1853, and Walter B. Scates was elected as his successor June 5, 1854. Judge Treat resigned on March 23, 1855, having been appointed district judge of the United States for the southern district of this State, and was succeeded by Onias C. Skinner, elected June 4, 1855. Judge Scates resigned in the spring of 1857, and Sidney Breese was elected as his successor November 3 of that year. Judge Skinner resigned April 19, 1858, and on the same day Pinkney H. Walker was appointed as his successor. Judge Caton resigned January 9, 1864, after a service of nearly twenty-two years. Corydon Beckwith was appointed as his successor January 7, 1864, serving until June 6 of the same year, when, his term having expired, Charles B. Lawrence was elected to succeed him. These three judges (Walker, Breese and Lawrence,) constituted the court from that time until it was re-organized under the present constitution.

No very material changes in the jurisdiction of the court were made by the constitution of 1848, though its original jurisdiction was extended to embrace proceedings on *habeas corpus*. The decisions of the court under that constitution are contained in volumes 10 (5 Gilm.) to 54 of the Illinois Reports, both inclusive.

The period during which the constitution of 1848 was in force was fraught with great events in this State, and, indeed, throughout the world. Illinois was then a great agricultural, rather than a trading and commercial, commonwealth. Its institutions had rather a bucolic flavor at the beginning of this epoch, and, indeed,

the decisions of the court were sometimes thus colored. Printed abstracts were first required in 1855, when the agenda docket was introduced, and printed briefs followed the next year. The justices received the munificent salary of \$1200 per year.

Did time permit, I could wish to say something of the great lawyers who practiced before the court, but I must not stop even to name them. Their learning and talents were no inconsiderable factor in contributing to the strength and solidity of the judgments of the court.

This was a time of building up in the history of our State. In 1848 our population was, approximately, 800,000. It had reached 2,500,000 in 1870. Our great system of railways was first developed in this period, and probably our material progress, both in State and nation, was never more rapid and substantial in the same space of time than in these teeming years. Within this period the first trans-continental railway (really initiated by Judge Breese) was built, the first Atlantic cable was laid, a sound and national currency was established, and there began that astounding progress in the accumulation of national, corporate and individual wealth which has now reached such a point as almost to pass comprehension. Yet, as we look back, we find it difficult to turn our attention to these achievements, for in these years the great contest over human slavery which so engaged our people, after calling forth the glowing eloquence, the profound constitutional learning and the loftiest philanthropy of teacher, poet, preacher, statesman and orator, was transferred to camp and field and its fateful issue committed to the dread arbitrament of war, and from that long, titanic and awful struggle the nation emerged purified, indeed, and glorified, but a new and re-created nation,—a mighty world power,—something different, and, in a measure, strange to us. The old order changeth.

It almost seems trite, even in this connection, to refer to the immortal Lincoln, yet it was before the court of which I have spoken that he practiced his and our profession. Here was his home, and here he rests near the scenes of his early struggles and his glorious triumphs. And how can we here and now escape the thought of him? Born in obscurity, reared in want and poverty, denied almost all the advantages of education, the plainest of the

plain people, he stands to-day secure in the Pantheon of Nations, the great colossal figure of his age and time. May the inspiration of his great character, that full measure of devotion and sacrifice which marked his consecration to the great cause of human freedom and popular government, guide and lead our people back from sordid, venal and unworthy standards to common honesty in their political activities and to a high and patriotic devotion to public and to civic duty.

Hon. W. R. Curran, of Pekin, next addressed the audience, his subject being, "The Supreme Court under the Constitution of 1870." Mr. Curran said, in part:

The acquisition of the Northwest Territory by George Rogers Clark and his band of intrepid frontiersmen is one of the most momentous facts in the history of modern civilization. Time fails to tell of the great results this event made possible, but not least among the number is the fact that the cession to the general government by the State of Virginia of this magnificent land,—in extent and value the foundation and site of an empire within itself,—made feasible the ratification of the Federal constitution by the parent States and finally determined that this should be a nation and not a confederation. Within the borders of this garden of the world has mingled the blood of the Puritan, the Cavalier and the sons of continental Europe, fused in a common melting pot, which has made the strongest and most virile race of men that has ever trod the earth.

How fitting is it, then, that within this land and by this combination of people should be founded the "Illini," with a representative government based on a written constitution,—the foremost State among the sisterhood of five States founded in the great territory,—and that within a period less than a century after the adoption of its first constitution it should stand third among the States of the nation. This result has followed as the harvest follows seed time or fulfillment follows prophecy. With this free, aggressive, composite, industrious people to build the State on this fertile, sunlit soil, how doubly fitting is it that it should be called Illinois—the Land of Man! In the processes of growth of the State from its virgin wilderness to its present development her states-

men have been loyal to the landmark set by the fathers. They have declared by act and deed that among their chief objects in creating a more perfect government was "to establish justice." They understood that "Justice, sir, is the great interest of man on earth." The adoption of a new constitution from time to time has been but the expansion of the fundamental law of the State to its increased growth, changed needs and environment. The constitution of 1870, in its establishment of courts, and the courts that have been created under its provisions, together with the judgment and decrees entered by those courts since the admission of the State into the Union, constitute at this time the answer of Illinois to the question, How shall justice be established among men?

The present constitution was ratified by the people of Illinois and went into force August 8, 1870. The Supreme Court of the State was organized under this constitution at the September term of the same year. The number of judges had been increased to seven. Mr. Justice Charles B. Lawrence was chief. The associate justices were Pinkney H. Walker, John M. Scott, Anthony Thornton, Sidney Breese, William K. McAllister and Benjamin R. Sheldon. The first reported opinion of the court as then organized is *Mason v. Burton*, in the 54th Ill. 349. There were on the docket for trial at that term 640 cases. The large number is accounted for by the fact that formerly only two terms of the court were held each year. In addition to these judges there have served, who are now deceased, Justices John Scholfield, T. Lyle Dickey, David J. Baker, John H. Mulkey, Damon G. Tunnicliffe, Benjamin D. Magruder, Jacob W. Wilkin, Joseph M. Bailey, Jesse J. Phillips, James B. Ricks and Guy C. Scott. There have served, those who are yet living, Justices Simeon P. Shope, Alfred M. Craig, Joseph N. Carter, Carroll C. Boggs, and the justices now serving, James H. Cartwright, John P. Hand, William M. Farmer, Alonzo K. Vickers, Orrin N. Carter, Frank K. Dunn and George A. Cooke.

The power, influence and importance of a court of last resort depend somewhat upon its environment; upon the extent of territory over which it exercises jurisdiction; the subject matters of its jurisdiction; the prevalence of peace or war; the number of population; the wealth and business activities of the communities

that constitute the State; the stage of development in civilization of the people; the growth of industrial appliances; the mental activity among the people; the means of transportation of materials, people and ideas; the efficiency or lack of efficiency of the prevailing financial system; the law-abiding character of the people of the State, together with its conditions of general business prosperity or depression,—all have their effect upon the mass and character of the work of the court. They tend to determine not only the number but the character and importance of the cases submitted for determination, as well as the value and influence of the opinions when rendered.

When democracy is in the throes of growth and the average man is asserting that he is entitled to have, and will have, exactly the same thing on exactly the same terms as any other man; when a large number of men bar the way and say they shall not; the State must needs bear the pains of its growth and her constitution feel the tension of the conflict. Both the rights of things and the rights of persons must be justly safeguarded by the court, and all the parties to the throes and conflicts that ceaselessly follow must be held with a steady hand within the fundamental law of the land. These conditions have thrown upon the Supreme Court a mass of litigation, in the number of the cases and importance of the questions involved, since the adoption of the present constitution, almost appalling, and it has been thought in some quarters a menace to the efficiency of the work of the court. In May, 1881, attention was called in the *North American Review* to the condition of the docket of the Supreme Court of the United States, and emphasis put on the fact that in that court, with nine judges to dispatch the business of the court, a docket containing an average of 390 cases a year was a matter of serious consequence. When we consider that the Supreme Court of this State, consisting of seven judges, commenced the September term of 1870 with a docket of 640 cases; that in 1877 the Appellate Court of four divisions, with twelve justices, was created to relieve the docket of the Supreme Court, and that the Appellate Court, in the thirty-four years of its existence, has disposed of more than 16,000 cases, reported in 153 volumes of Reports, most of which cases did not reach the Supreme Court either by appeal or writ of error; and further considering that notwithstanding this aid in the work the

Reports of this court for the forty years of its present organization have had added to their number 182 volumes, making the 246th Illinois the last report on the shelf; when we further consider that for more than fifteen years the reported opinions of the court have averaged about 600 per year, and that during the fiscal year from December, 1909, to and including October, 1910,—five terms of court,—there were 693 cases disposed of, including petitions for writs of *certiorari* to the Appellate Court, in which opinions were not written, making an average of more than two and one-half cases per working day of the court during that period,—we commence to get a glimpse of the volume of work that has been performed by the court in the past and what confronts it now. It is a matter of increasing wonder to the bar and people of the State that the labor has been so ably, promptly and efficiently performed. When we further consider that at the October term, 1910, opinions were prepared in every case submitted and that those opinions were all adopted and filed as the final opinions of the court, except nine, then it is truly said that in Illinois justice is not delayed. The oft quoted adage of Mr. Gladstone, "Justice delayed is justice denied," has not applied to this jurisdiction.

Of the mass of cases decided, by far the greater portion have involved only private rights or wrongs,—questions of vital and tragic interest to the parties involved but not important to the general public or affecting in any way public rights; but in the perpetuation of a State, justice to the individual, the weak, the ignorant and the defenseless is as vital as to the many, the wise, the strong. If this were not so, it would be truly said of us as was said in the dawn of time in the Hebrew tongue of a like condition:

"Your memorable sayings are proverbs of ashes.
Your defenses are defenses of clay."

Many of the cases, however, have involved grave constitutional questions and matters of great public moment that have gone deep down to the sources of feeling and prejudice of the people, the wise and just solution of which was of far-reaching public effect and rendered more firm and secure the foundations of the State.

A study of the decisions of the court as a whole reveals the fact that the guiding star of the ship of state is fixed and stands

out clear in the horizon. The work has been well and patriotically done by these servants of the people entrusted with this great power. The opinions of the court have the respect and approval of the people, the bench and the bar of Illinois and the respect of the supreme tribunals of our sister States. No better test of the standing of the opinions of the Supreme Court of Illinois in the courts of last resort of the nation can be found than by a comparison of the frequency of their quotation in the opinions of those courts. This is an unconscious tribute to merit.

The real power of a supreme tribunal is not in the great, strong wind that rends the mountains and breaks in pieces the rocks; it is not in the earthquake that shaketh the foundations of the State; it is not in the fire, but in "the still small voice" of reason, that cometh to its own after the wind, the earthquake and fire of political upheaval have passed by. Its power is the power of the spirit, its influence moral, restraining and governing the minds of men.

Criticism of judicial acts is like the clouds of the night that linger through the morning's breaking light. As the sun comes they roll away and leave behind them perfect day. As time passes, the wisdom of the labor of the court stands out a monument to the memory of the minds who have wrought. To the living who have passed from service in this court, and the friends and fellows of those who have passed through the gates to service on the other side, we can say that their duties here have been performed in honor. They have the consciousness that "a just and wise magistrate is a blessing as extensive as the country to which he belongs; a blessing that includes all other blessings whatsoever that relate to this life."

To the State of Illinois we can truthfully say, whatever criticism may be made of others, the integrity of the Supreme Court of Illinois has never been questioned. It has always stood, and now stands, above suspicion. The slimy trail of the serpent of political slander has never crossed its threshold. No charge of dishonor has ever been made.

We do but honor ourselves and the State when we hang the portraits of these public servants in this beautiful temple dedicated to justice. No greater honor can come to man than to be held worthy by his fellows to minister in her courts.

The exercises closed with a response in behalf of the court by Mr. Justice Cartwright, who spoke, in part, as follows:

On the first Monday of August, in the year 1818, a convention of thirty-three delegates met at Kaskaskia to frame a constitution as a basis for admission to the union of States. In that instrument, which was to be the fundamental law of the new State, they declared the objects which they sought to attain, and the object which was first in their minds and first found expression in their words was "to establish justice." That is not only the chief object of all good government, but it is necessary to the existence of organized society. When men are brought into relations with each other, any plan for their government and the protection of their rights and interests must have its foundation in the principles of justice and provide for making them effective. The legitimate object of written law created by legislative action is to establish just rules of conduct, and that is the aim of the unwritten rules regulating the relations of men to each other as declared by the courts. Justice is the sure foundation of peace, good order and security against strife between different conflicting interests, tending to weaken or destroy the State. Judicial decisions and legislative acts must alike commend themselves to an enlightened judgment as just, and if either favor one class or body of citizens at the expense of another they merit the condemnation they receive. It has been said of justice: "Truth is its handmaid, freedom is its child, peace is its companion, safety walks in its steps, victory follows in its train; it is the brightest emanation from the gospel; it is the attribute of God."

It was this which the constitution of the new State was intended to establish, and to that end the essential principles of liberty were declared and restraints thrown around the exercise of legislative power. In order that these principles should be maintained, the limitations made effective and justice be done, the General Assembly was authorized to create inferior courts. Following the theory and practice of the country from which the people derived their system of laws, this court was created by the constitution itself for the review of cases where any party might feel himself wronged, and with an original jurisdiction in cases

relating to the revenue, cases of *mandamus*, and such cases of impeachment as might be required to be tried before it. The appellate jurisdiction was necessary to correct such errors as might occur in the inferior courts. In 1720 Lord Chief Justice Pratt, speaking of the English system of laws, said: "It is the glory and happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment, but that if he apprehends himself to be aggrieved he has another court to which he can resort for relief. For this purpose the law furnishes him with appeals, with writs of error and false judgment." He also gave expression to his own feeling respecting the right of review in a sentiment which has been echoed by every judge who has desired that justice should be done. He said: "For my own part, I can say that it is a source of great comfort to me that if I do err, my judgment is not conclusive to the party, but my mistake will be rectified and so injustice not be done."

It has been the duty of this court to define and enforce the rules established which govern the relations of individuals to each other, to construe the written laws in accordance with the legislative intention, and, most important of all, to protect citizens in the guaranties of the constitution. In a representative government, legislative bodies are intended to be immediately responsive to the will of the majority of the people, and their acts which do not conflict with the constitution are to be upheld. If, however, the provisions of the fundamental law, adopted by the people after much deliberation, are overlooked, the court is charged with a duty, for which a solemn oath is exacted, to support the constitution. This court has performed the duties so imposed upon it through the existence of the State and under the constantly changing conditions which have marked the growth of a great commonwealth.

The convention of 1818 was authorized to adopt a constitution provided it should appear from an enumeration directed to be made that there were within the proposed State not less than 40,000 inhabitants,—less than there are to-day in many single counties or minor cities, and but a handful that would be lost sight of in the great metropolis of the west. There were then twelve counties in the extreme southern part of the territory south of the north line of St. Clair county and a line slightly north of that line extending to the Wabash. The remainder of the territory was divided into

three counties, Crawford, Bond and Madison, extending north to the Canada line. After the admission of the State into the Union these counties had for their northern limit the northern boundary of the State, and they were represented in the convention by seven delegates. Looking from that day to this they seem like different ages of the world, and yet the intervening period is but a day in the annals of time or the history of a nation.

This court has been required to keep pace with the rapid growth of the State. Beginning with the simple questions arising between the settlers concerning their rights, it has sought to apply the same principles of right and justice to the many questions arising from more complex conditions and the restless energy of a great people, as well as from new legislation. While the principles upon which justice is administered have always been the same, no two sets of circumstances are precisely alike and the growing complexity of social conditions often renders their application difficult, but the court has sought to select and apply such rules as would accomplish justice in each case. The work has not been perfect, as no work of human hand or brain is perfect, but it has never been questioned that the motives have been pure and that there has been a conscientious effort to fulfill the high mission of establishing and maintaining justice. So far as there are imperfections, they fade away with maturer judgment and consideration, and that which is in accordance with the eternal principles of right endures.

Time, that has wrought great changes in the State; has brought about continuous changes in the membership of the court, and this hour is devoted to recalling the memories of those who are no longer concerned with its activities. We are reminded by the fact that so large a number of judges are no longer members of the court, how quickly we pass through the scenes of life, perform our parts and disappear. The entrance to active life, the busy day and the exit cover but a brief space. Of those who were members of the court fifteen years ago no one but myself remains in the court, and the portraits of all of the others are unveiled to-day. Of those who have been judges during that time, six have passed away, while three, and one who served before, who are not now judges, are still living in the respect, confidence and honor of all who knew them. Of those whose portraits are unveiled, the work of

all has been preserved in the reports of the decisions of the court, and in them those who have passed away still live. Only those die who leave no continuing influence behind them, and while the voices of those who have passed from the scenes of this life are no longer heard, the printed word is read in the halls of justice and still sounds the true note of right and truth.

The men who are honored to-day sought with painstaking care to discover the correct rule and record the truth in their decisions, and their labors were cheered and lightened with dreams and hopes of approval by those who should come after them and pass judgment upon their work. Their hopes and dreams have been fulfilled, and these proceedings by the bar of the State attest with what success their labors are crowned and in what honor and respect their names are held.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

SADIE FINKELSTEIN, Appellant, *vs.* SAMUEL LYONS,
Appellee.

Opinion filed April 19, 1911.

1. COURTS—*a court has full control over its orders during the term.* A court has full power and control over its judgments and orders during the term at which they were entered, and they may be modified or vacated, upon proper showing, as justice requires.

2. SAME—*extent to which approval of an appeal bond deprives trial court of jurisdiction.* The approval and filing of an appeal bond deprives the trial court of power to enter any further orders affecting the rights of the parties while the order approving the bond remains in force.

3. SAME—*court may, at same term, set aside an order approving appeal bond, vacate judgment and grant a new trial.* During the term at which an order approving an appeal bond is entered the trial court has power to set aside such order, and if the judgment appealed from was rendered at that term may vacate the judgment and grant a new trial. (*Briggs v. Dunne*, 163 Ill. 36, followed.)

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding.

MCGILVRAY, EAMES & MACLEAN, and WARREN PEASE,
for appellant.

DAVID K. TONE, and BERNARD J. BROWN, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court :

Appellant sued appellee in the superior court of Cook county for damages for criminal assault. A verdict was returned in her favor June 15, 1910, and on July 15, 1910, after overruling a motion by appellee for a new trial, the court rendered judgment on the verdict. Appellee prayed an appeal to the Appellate Court for the First District, which was granted upon condition that he file an appeal bond within thirty days in the sum of \$17,500, bill of exceptions to be filed within sixty days. On July 16 appellee presented his appeal bond, which was approved by the court and filed. On July 28, which was during the term at which the judgment was rendered, appellee filed motions in the superior court to set aside the approval of the appeal bond, to set aside the order denying the motion for a new trial, and to set aside the judgment and to grant a new trial on the ground of newly discovered evidence. These motions were continued to the August term, during which term they were allowed, the order approving the appeal bond vacated and the judgment set aside and a new trial awarded. Appellant objected to the court considering or allowing these motions, and on the 20th day of October, 1910, she filed in the Appellate Court for the First District a transcript of the record of the superior court and moved to dismiss the appeal, with statutory damages, on the ground that the superior court had no jurisdiction to make any order in the case after the appeal bond was approved and filed. The Appellate Court struck the transcript from the files, and appellant thereupon entered her motion for a reconsideration by the Appellate Court of the order striking the transcript from the files and refusing to

dismiss the appeal, with damages. This motion was also denied by the Appellate Court and a judgment for costs entered against appellant. The Appellate Court granted a certificate of importance, and she has prosecuted this appeal from the order and judgment of the Appellate Court.

The question raised by this appeal is whether the superior court had jurisdiction and authority to entertain a motion to set aside the order approving the appeal bond and grant a new trial at the term at which the judgment was entered. While the orders setting aside the approval of the appeal bond and granting a new trial were not made at the term at which the judgment was entered, the motions were filed at that term and continued to a subsequent term. No question is raised as to the authority of the court to continue the motions and act upon them at a subsequent term if it had authority to entertain the motions at the term at which the judgment was entered. Appellant's only contention is, that when the appeal was perfected by the filing and approval of the bond, the case was thereafter beyond the jurisdiction of the superior court and was pending in the Appellate Court, and the superior court had no authority or jurisdiction to make any order whatever in the case.

Appellant relies upon decisions of this court in which it was said that after the approval of an appeal bond the case would be considered as pending in the court to which the appeal was taken, and under those conditions it would be beyond the power and jurisdiction of the trial court to enter any order in the case affecting the rights of the parties. This rule was announced in view of the fact that the appeal had been perfected and was still in force, and, of course, under such circumstances it would not be within the jurisdiction of the trial court to make any further order or take further steps in the case. The decisions of this court relied on by appellant are *Owens v. McKethe*, 5 Gilm. 79, *Reynolds v. Perry*, 11 Ill. 534, *Smith v. Chytraus*, 152

id. 664, *Cowan v. Curran*, 216 id. 598, and *Merrifield v. Cottage Piano and Organ Co.* 238 id. 526. An examination of those cases will show that the question here raised was not involved in any of them.

In *Briggs v. Dunne*, 163 Ill. 36, the precise question before us was involved and determined contrary to the contention of appellant. In that case a final decree was entered, an appeal prayed and allowed and an appeal bond filed and approved. Afterwards, and during the same term of the court, appellee entered a motion to vacate the order approving the appeal bond on the ground that the sureties were insolvent and the bond worthless. The appellants resisted the motion, but it was allowed and an order entered vacating the approval of the bond, and a further order was entered requiring a good and sufficient appeal bond to be filed within five days. This latter order was not complied with. All this appeared from the transcript of the record filed by appellants in the Supreme Court, and it was contended by the appellants there, as it is by the appellant here, that when the appeal bond was filed and approved the case was thereafter to be considered as pending in the Supreme Court, and the circuit court had no jurisdiction to make the order vacating the approval of the appeal bond and requiring another bond to be filed. *Owens v. McKethe*, *supra*, and *Reynolds v. Perry*, *supra*, were relied on by appellants there in support of their contention, but this court held that the circuit court had authority to entertain the motion to vacate the order approving the appeal bond at the term at which the decree was entered and the bond approved. The court said (p. 38): "It is a familiar rule and one well understood, that a circuit court may, upon a proper showing, during the term at which a judgment or decree is rendered, modify or set aside such judgment or decree. In other words, during the term of court the court has free power and control over its orders and judgments, and they may be modified or set aside upon a proper showing, as

justice may require. If the court has the power to vacate a judgment or decree during the term, it is plain that the order vacating the judgment approving the bond was one within the jurisdiction of the court, and after that order was entered appellants' appeal was at an end unless a new bond should be filed within the time limited by the court. As that was not done the appeal is not properly here, and the motion to dismiss the appeal will be allowed."

The *Briggs case* is decisive of the one before us. Appellant admits that it is in point, but insists it is not in harmony with previous and subsequent decisions and should not control the decision of this case. We find no inconsistency between the *Briggs case* and the cases relied upon by appellant, nor do we see any ground for questioning the soundness of the rule announced in the *Briggs case*. It has always been held in this State that the orders and judgments of a court are under its control during the term at which they are entered and may be set aside during the term. If the court may set aside a judgment during the term at which it was rendered, we see no reason why it may not set aside an order approving an appeal bond also. It would, of course, be necessary to vacate the order approving the bond before the judgment could be set aside, for until that was done the case would, as said in the cases relied upon by appellant, be considered as removed from the jurisdiction of the trial court to the court to which the appeal was taken. Here the court proceeded properly by first vacating the order approving the appeal bond. That the court had authority to make the order that it did make is settled by the *Briggs case*. Whether it erred in the exercise of that authority and jurisdiction can only be determined after the case is disposed of and final judgment rendered in the superior court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

HAROLD E. HAMMOND, Appellee, vs. JACOB GLOS *et al.*
Appellants.

Opinion filed April 19, 1911.

1. **REGISTRATION OF TITLE**—*copy of certified copy of abstract of title is not admissible.* Section 18 of the Torrens law, authorizing the admission in evidence of abstracts of title, or certified copies thereof, made in the ordinary course of business by makers of abstracts, does not authorize the admission in evidence of an uncertified copy of a certified copy of an abstract.

2. **SAME**—*when continuations of abstract are properly admitted in evidence.* A continuation of an abstract is properly admitted in evidence in a title registration proceeding, where a witness testifies that it was made in the ordinary course of business, under his supervision, by the abstract-making company by whom he was employed, and that it was signed by him, as secretary of the company; so, also, is a continuation shown by a witness to have been made, under his supervision, in the recorder's office in the usual course of business and signed by the recorder.

3. **SAME**—*decree should not order registration of title in advance of reimbursement under tax deed.* A decree in a proceeding to register title should not provide for the registration of title in advance of reimbursement to the holder of the tax deed set aside by the decree, even though the decree provides for the dismissal of the application if the reimbursement is not made within thirty days from the entry of the decree.

APPEAL from the Circuit Court of Cook county; the
Hon. JOHN GIBBONS, Judge, presiding.

JOHN R. O'CONNOR, for appellants.

VICTOR M. HARDING, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application filed by the appellee in the circuit court of Cook county to register his title under the act concerning land titles, commonly known as the Torrens law, to the south half of the south-west quarter of the south-west quarter of section 30, township 37, north, range

15, east of the third principal meridian, (excepting railroad right of way,) being 18.214 acres, more or less, in Cook county, Illinois. It was averred that the appellants held a tax deed to said premises. The appellants filed answers, in which they denied title in the appellee and urged that the act under which the title was sought to be registered was unconstitutional. The case was referred to an examiner of titles, who filed a report finding that the title in fee to said premises was in the appellee; that the premises were vacant and unoccupied; that the tax deed held thereon by the appellants or through which they claimed title was void, and recommended that such tax deed be canceled upon the payment to the appellants of the sum of \$416 and that the appellee have his title registered. Thereupon the court entered a decree that the tax deed held by the appellants or through which they claimed title be set aside; that within thirty days the appellee pay to the appellants the sum of \$416, and that in default of such payment the application should stand dismissed at the cost of the appellee, and that the title of the appellee be registered forthwith, and this appeal has been prosecuted to reverse said decree.

The appellants concede that this court has held the Torrens law, as amended, constitutional, and make no contention on that branch of the case. *Waugh v. Glos*, 246 Ill. 604; *Culver v. Waters*, 248 id. 163.

Two questions, only, are argued in the briefs filed in this court. It is first contended that no proper foundation was laid for the introduction in evidence of the abstract of title upon which the appellee relied to show title in himself. The section of the statute authorizing the introduction of abstracts of title in evidence in this class of cases reads, in part, as follows: "The examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than *prima facie* evi-

dence of title, and any part or parts thereof may be controverted by other competent proofs." (Hurd's Stat. 1909, sec. 18, p. 549.)

The abstract of title admitted in evidence by the examiner consisted of three parts: (1) An abstract showing chain of title from the United States in 1847 to November 28, 1881, designated "a true copy," and signed, "Handy & Company," "Haddock, Vallette & Rickcords;" (2) a continuation from November 28, 1881, to January 16, 1902, signed, "Chicago Title and Trust Company, by Chas. R. Dalrymple, Ass't Sec'y;" (3) a continuation from January 16, 1902, to May 26, 1909, signed, "Abel Davis, Recorder." Charles R. Dalrymple testified his company furnished the parts of the abstract signed by Handy & Company, Haddock, Vallette & Rickcords, and the Chicago Title and Trust Company, by Charles R. Dalrymple, assistant secretary; that the part signed by Handy & Company, Haddock, Vallette & Rickcords was made by Handy & Company, and thereafter copied, including the signature of Handy & Company, by Haddock, Vallette & Rickcords and then signed by Haddock, Vallette & Rickcords, and that the copy introduced in evidence was prepared by his company, although not certified, from the copy signed Handy & Company, Haddock, Vallette & Rickcords. This part of the abstract was, therefore, at most, only a copy of a copy, the last copy not being certified. The statute provides for the admission of a "certified copy," but clearly not for the admission of an uncertified copy of a copy, even though the first copy was properly certified. We think, therefore, the part of the abstract signed Handy & Company and Haddock, Vallette & Rickcords, which was admitted in evidence, was not an original abstract, nor was it so certified as to entitle it to admission in evidence as a certified copy.

Mr. Dalrymple further testified he had been actively engaged in making abstracts in the city of Chicago for

fifteen years, and that the Chicago Title and Trust Company was engaged in making abstracts of title, and his testimony shows that the first continuation of the abstract was made in the ordinary course of business by the Chicago Title and Trust Company under his supervision and direction, and was duly signed by the Chicago Title and Trust Company by himself, as assistant secretary. J. G. Norris testified he was an employee in the recorder's office of Cook county, and his testimony shows that the second continuation of the abstract was made in the recorder's office of Cook county under his supervision and direction, in the ordinary course of business, and was signed by the recorder. We think both continuations were properly admitted in evidence. *Waugh v. Glos, supra; Culver v. Waters, supra.*

The decree entered in this case provides that the tax deed held by the appellants or under which they claim title be set aside as a cloud upon the title of the appellee, upon condition that appellee pay to the holder of the tax deed the amount found to be due for principal and interest and costs within thirty days from the entry of the decree, and that in default thereof the application be dismissed at the cost of the appellee, and that the title of the appellee be registered forthwith. A decree similar to this in *Mihalik v. Glos*, 247 Ill. 597, was reversed on the ground that the rights of the defendants were not properly protected by the decree, in this: that during the thirty days provided for the payment of the amount decreed to be paid defendants, complainants might transfer the property to the injury of the defendants. To the same effect is *Cregar v. Spitzer*, 244 Ill. 208. We are unable to distinguish the decree entered in this case from the decrees in those cases.

The appellants have padded this record by filing three separate answers and three sets of exceptions to the examiner's report, and have prayed separate appeals, filed separate appeal bonds and separately assigned error, and then

in this court treated the proceeding as one appeal. We think by this method of procedure unnecessary costs were made in preparing the record for removing the case to this court, which costs should be paid by the appellants.

The decree of the circuit court will be reversed and the cause will be remanded to that court for further proceedings in accordance with the views herein expressed, the appellants to pay one-half and the appellee one-half of the costs incurred by this appeal. *Reversed and remanded.*

H. H. BOLLES *et al.* Appellants, *vs.* WILLIAM PRINCE *et al.*
Appellees.

Opinion filed April 19, 1911.

1. CONSTITUTIONAL LAW—*matter of paying expenses of township election is within title of the City Elections act.* A township election, so far as that part of the territory of the town within the boundaries of a city is concerned, is an election within the city, and the matter of providing for the expense of such election is within the title of the City Elections act.

2. SAME—*sections 9 and 10 of article 9 of constitution do not refer to townships.* Sections 9 and 10 of article 9 of the constitution, prohibiting the imposition of taxes upon a municipal corporation except by its corporate authorities and for its corporate purposes, do not refer to townships, as a township, like a county, is a public corporation, which exists only for public purposes connected with the administration of the State government.

3. SAME—*township and its revenues are subject to legislative control.* A township, as well as its revenues, in the absence of express constitutional restriction, is subject to legislative control, so long as its property is not diverted from the use and objects for which it was given or obtained.

4. ELECTIONS—*the legislature has power to apportion expense of township election under City Elections act.* The legislature has the power to apportion the expenses of a township election held under the provisions of the City Elections act among the township, county and city.

5. SAME—*when township should pay judges and clerks of township election.* Article 7 of the City Elections act requires the county to pay salaries of election commissioners and clerks and the city to pay the expenses incurred by the board of election commissioners; and while there is no express provision that the township shall pay the judges and clerks in a township election, yet it is proper for the township to pay them, unless, as in case of the election of township officers at a city election, there is some provision of the statute to the contrary.

6. SAME—*a township is not liable for rent of polling places in city.* Where a township election within the limits of a city, which includes a part of the township, is held under the City Elections act, the township is not liable for the rent of the polling places in the city or for printing and miscellaneous expenses occasioned by holding the election under that act.

APPEAL from the Circuit Court of Vermilion county;
the Hon. W. B. SCHOLFIELD, Judge, presiding.

I. A. LOVE, and J. B. MANN, for appellants.

REARICK & MEEKS, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The city of Danville adopted the City Election act, (Hurd's Stat. 1909, p. 984,) and the first election held under its provisions was the township election on April 5, 1910. The city of Danville includes a part of the territory of the town of Danville. After the election the board of election commissioners presented to the board of town auditors of the town of Danville a bill for the expenses of conducting the registration and election in that part of the city within the town of Danville. The bill included the compensation of the judges and clerks of election, \$2040; rent of places for registration and election, \$252; printing and miscellaneous items, \$429.51. The board of town auditors refused to audit or allow the bill, for the reason stated that "an uncertainty exists as to the legal liability

of the township therefor." Thereupon a petition for a *mandamus* against the board of town auditors to meet, audit and allow the bill and the claims of the petitioners was filed in the circuit court. A demurrer was sustained, the petition was dismissed and the petitioners appeal. There were four petitioners, one a judge of election, one a clerk of election, one who furnished a place for the election and one who furnished printing and stationery.

The demurrer raised several constitutional objections to the City Election act, most of which are not insisted upon here, and would, in any event, be unavailing in view of the decisions in *People v. Hoffman*, 116 Ill. 587, *Wetherell v. Devine*, id. 631, and *People v. Wanek*, 241 id. 529. It is, however, insisted that if the act controls the expenses of town elections it includes a subject matter not mentioned in the title, which is, "An act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this State." The expense of holding an election in the city and declaring the result thereof, even though it should be an election of town officers, is within the title. The town election, so far as that part of the territory of the town within the boundaries of the city is concerned, is an election in a city.

It is insisted that if the expenses incurred by the election commissioners in the township election, and the registration therefor, are imposed upon the township, the act violates sections 9 and 10 of article 9 of the constitution, which prohibit the imposition of taxes upon a municipal corporation except by its corporate authorities and for its corporate purposes. It was stated in *Wetherell v. Devine*, *supra*, that those sections have no reference to counties but relate to and regulate the taxes for cities, towns and villages. The reasoning of that case applies with equal force to a township as to a county, and the power of the legislature over the revenues of a township is equally as extensive as over the revenues of a county. A township, like a

county, is a public corporation, which exists only for public purposes connected with the administration of the State government, and it and its revenues are alike, when no express constitutional restriction is found to the contrary, subject to legislative control, so that its property is not diverted from the uses and objects for which it was given or obtained. (*Marion County v. Lear*, 108 Ill. 343; *Wilson v. Board of Trustees*, 133 id. 443; *People v. Bowman*, 247 id. 276.) The legislature having control of the funds of the township was authorized to require the payment of the expenses of the township election by the township. The cost of the election is greater because of the larger and denser population of the city. The city received the benefit of the registration in the city election and the county also will be benefited by it. The legislature had the authority to make an apportionment of the cost among the county, the city and the township and require each to bear its portion. Article 7 of the act is devoted to this purpose. The county is required to pay the salaries of the election commissioners and chief clerks. The city is required to pay all expenses incurred by the board of election commissioners. The judges and clerks of election are directed to be allowed and paid five dollars a day in all city elections by the city, in State and county elections by the county. From what source the judges and clerks of a township election are to receive their pay is not expressly declared. It was not expressly declared either before or after the enactment of the City Election act. Before that act the judges and clerks of State and county elections were directed to be paid out of the county treasury. (Rev. Stat. 1874, chap. 46, sec. 75.) Though it was not expressly so provided, the judges and clerks of township elections have uniformly received their pay, at the rate provided by the general Election law, from the township,—the municipality to which they rendered service. The City Election act has declared that the judges and clerks of election shall be paid.

It has fixed the amount of their compensation. They are essential to the conduct of a township election. In the absence of any other provision of law the township is under obligation to pay them. The township is not, however, liable for the rent of the places of holding the election or the printing and miscellaneous expenses. These were expenses incurred by the commissioners required to be paid by the city. Nor is the township liable for the compensation of the judges and clerks of election when township officers are elected at a city election, for it is expressly provided by section 4 of article 7 of the act that the city shall pay their compensation in such case.

The judgment will be reversed and the cause remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

G. H. BECKER, Appellee, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Opinion filed April 19, 1911.

1. GARNISHMENT—*jurisdiction in garnishment depends on the place of residence of garnishee.* The question of the jurisdiction of the court in a garnishment proceeding depends upon the place of residence of the garnishee, where his creditor could maintain an action against him for the debt.

2. SAME—*the effect where garnishment suits are begun in two States.* Where garnishment suits are begun in courts of different States having concurrent jurisdiction the pendency of one suit can not be pleaded in bar of the other, but the recovery of a judgment and payment thereof in one suit, after a full disclosure of the pendency of the other and without collusion, will bar the other suit, regardless of which suit was first begun.

3. SAME—*when payment of an Illinois judgment bars foreign garnishment suit.* Where a judgment is recovered in Illinois for wages exempt from garnishment before a judgment has been rendered in a garnishment suit in another State for the same debt,

the payment of the Illinois judgment is a bar to the foreign suit, notwithstanding the latter suit was begun before the suit in Illinois was instituted.

4. *SAME—when rule that court first acquiring jurisdiction may retain it does not apply.* The rule that where courts have concurrent jurisdiction the one first acquiring jurisdiction may retain it does not apply where the courts are in different States, and in such case both suits may proceed until judgment is recovered in one suit, when it may then be set up in bar of the other.

5. *SAME—effect where defendant appeals from Illinois judgment instead of paying it.* Where a railroad company is sued before a justice of the peace in Illinois for wages exempt from garnishment and judgment is recovered against it before a judgment has been rendered by a justice of the peace in another State in a garnishment proceeding for the same debt, the company may pay the Illinois judgment and plead it in bar of the other suit; but if it elects to appeal to the circuit court and judgment is in the meantime recovered in the foreign State, the company is not entitled to pay the foreign judgment and rely upon it as a defense.

6. *CONFLICT OF LAWS—State must enforce laws made for benefit of its citizens.* It is the duty of the courts of a State to enforce within its borders laws made for the benefit of its citizens, such as a law exempting from garnishment wages due a wage earner residing in the State with his family.

7. *SAME—when garnishee's payment of foreign judgment does not bar payment of Illinois judgment.* By the service of garnishment summons in a foreign State the plaintiff acquires an inchoate lien upon the debt and the garnishee cannot thereafter make a voluntary payment, but the plaintiff's right to a lien depends upon subsequently obtaining judgment; and if such judgment is not recovered until after a judgment has been recovered in Illinois for the same debt by a court of concurrent jurisdiction, the payment of the foreign judgment will not protect the garnishee against payment of the Illinois judgment.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Marion county; the Hon. J. C. McBRIDE, Judge, presiding.

W. W. BARR, and CHARLES E. FEIRICH, (W. S. HORTON, of counsel,) for appellant.

C. F. DEW, and A. D. RODENBERG, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, George H. Becker, the head of a family residing with the same in this State, was employed by appellant, the Illinois Central Railroad Company, as a brakeman on its line between Centralia and Mounds, and earned wages which were exempt from garnishment by virtue of section 14 of the Garnishment act. DeBower, Chaplin & Co., of Chicago, claiming to be a creditor of appellee to the amount of \$32, assigned the account to N. B. Miller, of Kansas City, Missouri, and on July 9, 1909, Miller commenced a suit in attachment against appellee before a justice of the peace in Kansas City. The writ of attachment was returnable on July 20, 1909, and was returned on that day not found as to appellee but served on July 10, 1909, on the appellant, as garnishee. On July 17, 1909, appellee demanded payment of his wages, which demand was refused on the ground the garnishment proceeding had been begun in Missouri. On the same day appellee made and delivered to appellant an affidavit in compliance with the provisions of the said section of the Garnishment act, which requires an employer, upon the making and delivery of the same, to pay the wage earner exempt wages notwithstanding the service of any writ of garnishment upon the employer. The demand was ignored by appellant, and appellee brought this suit on July 30, 1909, against appellant for his exempt wages before a justice of the peace of Marion county. On July 20, 1909, the justice of the peace in Kansas City continued the attachment suit to July 30, 1909. On July 23, 1909, before the justice had obtained jurisdiction of appellee or appellant was required by law to make any answer, it filed its answer as garnishee, stating that it was indebted to appellee in the sum of \$56.72 on ac-

count of wages, which were exempt under the law of this State; that the sum demanded by Miller was less than \$200; that no judgment had been recovered against the appellee, and that under the laws of the State of Missouri the writ of attachment and garnishment notice were null and void, and appellant moved to dismiss the action against it. On July 30, 1909, the date to which the attachment suit had been continued, an order was made for publication to appellee, and the cause was again continued until August 20. The summons issued by the justice of the peace in this State was returnable on August 6, 1909, and was served on the day it was issued. On the return day the parties appeared and judgment was rendered in favor of appellee, against appellant, for \$56.68 and costs, including an attorney's fee of \$5. Afterward, on August 30, 1909, proof of publication of notice to appellee was made in the justice's court in Missouri, and the justice overruled the motion of appellant to dismiss as to it and also the claim of exemption, and rendered judgment against appellant for \$32 and costs. Appellant paid that judgment and appealed from the judgment of the justice of the peace in this State to the circuit court of Marion county, where the cause was tried by the court without a jury. The sole defense offered was the proceeding before the justice of the peace in Missouri, and the court received evidence of that proceeding but refused to hold propositions that it was a good defense to the claim of appellee for the amount paid, and rendered judgment for \$56.68 and costs. The Appellate Court for the Fourth District affirmed the judgment and granted a certificate of importance and an appeal to this court.

In the case of *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, a suit in attachment was brought by Wilson Bros. & Co. in the circuit court of Cook county against Corbetts, a resident of Wisconsin, and the insurance company was summoned as garnishee. Afterward, Dowling, another

creditor of Corbetts, instituted garnishment proceedings in Wisconsin against the insurance company on the same debt owing to Corbetts. Although the suit in this State was instituted first, a judgment was first rendered by the Wisconsin court and that judgment was paid by the insurance company. A judgment was afterward rendered by the circuit court of Cook county against the insurance company and was affirmed by the Appellate Court for the First District, but it was reversed by this court. There was a very full consideration of the law and review of the decisions, and the law of this State was settled on the questions involved. We disagreed with the doctrine maintained by the Supreme Court of Wisconsin that the jurisdiction in garnishment proceedings is dependent upon the *situs* of the debt, which, so far as so intangible a thing as a debt can be said to have a *situs*, is at the domicile of the creditor, and held that the question of jurisdiction depends upon the place of residence of the garnishee, where his creditor could maintain an action against him for the debt. Although it was considered obvious that the grounds upon which the Wisconsin court based its judgment were untenable, that court had jurisdiction under our view of the law, and we held that the payment of the judgment barred further prosecution of the suit in this State. This conclusion was reached upon the grounds that the two courts had concurrent jurisdiction, and the rule in such cases that the one first acquiring jurisdiction will retain it until the matter is disposed of, applies only to courts of the same State and does not apply to courts of different States; that where two courts of different States have concurrent jurisdiction of the same matter, a suit pending in one State cannot be pleaded in abatement or in bar of the suit in the other State; that both suits may proceed until judgment is rendered in one of the suits, when it may be set up in bar of the further maintenance of the other; that it makes no difference which suit was first commenced, and that the recovery and

payment of one judgment after a full disclosure of the pendency of the other suit and without collusion by the garnishee will bar a recovery in the other State. The application of that doctrine to the garnishment suits was based on the settled rule in ordinary actions which had been previously declared in *McJilton v. Love*, 13 Ill. 486, and other cases, and it is equally applicable where there is a pending garnishment proceeding in one State and an action against the garnishee by the principal defendant in another State. In any case, the courts will see that the debtor who is without fault is not compelled to pay his debt twice, but that is the only right he has. The pendency of the garnishment proceeding in Missouri was no bar to the suit of appellee in this State, but in the case of an ordinary debt a compulsory payment of the judgment first rendered would protect appellant against another judgment for the same debt. When judgment was rendered against the appellant in this State for wages exempt from garnishment, payment of the judgment would have been a good defense to the further prosecution of the suit in Missouri. The appeal to the circuit court was a voluntary act of the appellant, with the effect of letting in a foreign judgment which had been rendered against the appellant in Missouri and paid before the trial in the circuit court. Such a voluntary act in a case where the appellant had no defense to the claim could not, without injustice, be permitted to affect the rights of the appellee. By the service of the garnishee summons in Missouri Miller acquired a contingent or inchoate lien upon the debt and appellant could not thereafter make a voluntary payment to the appellee, but the right which Miller acquired was dependent upon subsequently obtaining judgment, and that was not accomplished until a judgment had been recovered in this State, where the debt was free from any right or claim that he had. The law of this State for the protection of the wage earner who has a family and

resides with the same exempts his wages from garnishment to a certain amount, and it is the duty of the State to enforce within its own borders the laws made for the benefit of its citizens. We give full faith and credit to the judgment of the justice of the peace of Missouri, but the payment of it will not suffice to protect the appellant from the payment of the judgment of our own court. Before that judgment was rendered the judgment for the same debt was rendered in this State, and the status of the debt as exempt from garnishment had been fixed.

A penal statute of this State prohibits the sending out of this State of any claim for debt to be collected by proceedings in attachment, garnishment or other *mesne* process with intent to deprive any resident of this State of his rights under the exemption laws. While the law of Missouri only provides for exemptions to a resident of that State, it prohibits the issue of garnishment process in any cause where the sum demanded is \$200 or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action, and no railroad corporation is required to make answer to any interrogatories propounded to it in any action against any person to whom it may be indebted on account of wages, where the writ was issued or served in advance of the recovery by the plaintiff against the defendant in any action for \$200 or less. Questions arising under these statutes are argued by counsel, but have been ignored as not necessary to the decision of the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

FRANK O. BUTLER, Appellant, *vs.* THE AURORA, ELGIN
AND CHICAGO RAILROAD COMPANY, Appellee.

Opinion filed April 19, 1911.

1. RAILROADS—*when electric road is not required to maintain fence at highway intersection.* Section 1 of the act relating to the fencing and operation of railroads does not require that a fence be erected across a walk leading to a station platform of an electric railroad at the intersection of its right of way with a highway, where all other parts of the right of way are fenced and cattle-guards placed as required by law.

2. SAME—*question whether use of a third rail is common law negligence is a question of fact.* Whether the use by an electric railroad of a third rail charged with electricity is common law negligence under the circumstances shown in a particular case is a question of fact, upon which the finding of the Appellate Court is conclusive.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. EDWARD A. DICKER, Judge, presiding.

ASA Q. REYNOLDS, for appellant.

HOPKINS, PEFFERS & HOPKINS, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an action of tort brought by appellant against appellee in the municipal court of Chicago to recover damages for the loss of a cow which was killed by coming in contact with the third rail of appellee's electric railroad where it is crossed by a public highway about a mile south of the village of Elmhurst, DuPage county. A trial was had before the court without a jury and defendant found not guilty and judgment entered for costs. A writ of error was sued out of the Appellate Court for the First Dis-

trict, and that court affirmed the judgment of the municipal court. The case comes to this court upon a certificate of importance granted by the Appellate Court.

Appellee owns and operates a double track electric railroad running east and west and crossing Spring road, a public highway, at right angles. The right of way is about one hundred feet wide, and except at the highway crossing is fenced on both sides. On the west side of the crossing a fence extends from the south line of the right of way to the south track, where it connects with the cattle-guards extending across the tracks. On the north side of the track is a platform which is used by passengers taking the west-bound trains. This platform is about sixteen inches higher than the road-bed, and is reached from the highway by a cinder walk which is practically on a level with it. A fence extends north from the platform and connects it with the fence on the north line of the right of way. Appellant, on the day the accident occurred, was driving a number of cattle on the public highway, and when the crossing was reached the cow which was killed turned west on the right of way, and by passing over the cattle-guards or by getting on the station platform and jumping off came in contact with the electrically charged third rail of appellee's road and was killed.

Appellant contends that the killing of the cow resulted from a failure of appellee to fence its right of way, as required by paragraph 62 of chapter 114 of the Revised Statutes. The platform was used as a public station or depot for receiving and discharging passengers by appellee, and appellee contends that the provision requiring the right of way to be fenced does not apply.

Paragraph 62 is as follows: "That every railroad corporation, shall, * * * erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle * * * from getting on such railroad, except at the crossings of

public roads and highways, and within such portion of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks, * * * and shall also construct * * * cattle-guards suitable and sufficient to prevent cattle * * * from getting on such railroad; and when such fences or cattle-guards are not made as aforesaid, or when such fences or cattle-guards are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the agents, engines or cars of such corporation, to such cattle, * * * and reasonable attorney's fees in any court wherein suit is brought for such damages, or to which the same may be appealed; but where such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done."

The only point on the right of way which was not fenced was where the cinder walk approached the platform. The record does not disclose to what extent the platform is used by the public, but it is evident that to require it to be fenced at this place would inconvenience those desiring to board and alight from the trains and would interfere with its use by the public. In *Chicago, Burlington and Quincy Railroad Co. v. Hans*, 111 Ill. 114, it was said: "It is the duty of a railway company to establish depots, etc., and so operate its road as to afford the public reasonable safety and dispatch in the transaction of business. To effect this, and to accommodate those traveling its road or transacting business with the company, it is necessary that it should at all reasonable times provide a ready and convenient means of access to its stations and depots. To require those places to be fenced would cause delay and inconvenience to the public and detract from the public character of railways." Under the decision in that case and in view of the use of the station platform by the public we do not think appellee was required to fence that por-

tion of its right of way, and its failure to do so does not render it liable for the loss of appellant's cow.

Appellant contends that if appellee is not liable under the statute, the use by it of the third rail, charged, as it was, with electricity, was such negligence at common law as renders it liable. The question whether or not appellee was guilty of negligence at common law is a question of fact, and the finding of the Appellate Court upon this question is not reviewable by this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SARAH A. SMITH *et al.* Plaintiffs in Error, *vs.* WILLIAM TUCKER *et al.* Defendants in Error.

Opinion filed April 19, 1911.

1. DEEDS—*when rule in Shelly's case does not apply.* The rule in *Shelly's case* does not apply to a deed where the limitation over is not to the heirs of the grantee but to the heirs of the grantor.

2. SAME—*when deed conveys estate for grantor's life.* A deed conveying to the grantee, his heirs and assigns, certain described land, and containing, in the granting clause, a provision that the deed is to remain in force only during the lifetime of the grantor and that at her death the property shall revert to the grantor's heirs, conveys to the grantee and his heirs and assigns only an estate for the life of the grantor.

3. LIMITATIONS—*what proof not sufficient to show ouster of co-tenants.* Testimony by the defendants to a bill in chancery to the effect that since they went into possession of the land in controversy their possession had been exclusive and peaceable, that they exercised acts of ownership and claimed to own all the land, that they paid the taxes thereon regularly every year and that no person claimed the premises adversely, does not show an ouster of other tenants in common nor show a title by limitation.

4. SAME—*a bond for a deed is not color of title.* A bond for a deed is not color of title and will not support a title by adverse possession and payment of taxes for seven years.

5. EQUITY—*when bill should not be dismissed.* Where the evidence in a proceeding in chancery to recover an interest in land

fails to establish the complainants' full claim but shows that they have some interest in the land the extent of which depends upon further proof, the bill should not be dismissed but an opportunity should be given to supply the proof necessary to show their exact interests.

WRIT OF ERROR to the Circuit Court of Pope county;
the Hon. W. W. DUNCAN, Judge, presiding.

MORRIS & HAYES, for plaintiffs in error.

CHARLES DURFEE, for defendants in error.

Mr. CHIEF JUSTICE VICKERS delivered the opinion of the court:

The plaintiffs in error, Sarah A. Smith and Nannie Jeffers, filed their bill in chancery in the circuit court of Pope county alleging that they are the owners in fee simple, as tenants in common, of a tract of land described therein and containing 120 acres and are entitled to the possession thereof; that defendants in error, William Tucker and Daniel Tucker, are in the possession of said land but have never had any interest in the same except an estate for the life of Sarah J. Keel, the mother of plaintiffs in error, in an undivided one-half thereof, which was acquired by *mesne* conveyances from Lewis W. Chrishman; that Sarah J. Keel died October 13, 1908, and the estate of the defendants in error was thereby terminated and plaintiffs in error thereupon became entitled to the immediate possession of all of the land; that a certain deed from said Sarah A. Smith and Alexander Blair and Maggie Sim, a brother and sister of plaintiffs in error, to one D. G. Thompson to said land was procured by fraud and was without consideration; that the defendants in error have cut, sold and destroyed valuable timber grown on the premises while tenants for the life of Sarah J. Keel, which timber would now be worth more than \$1500, and that Alexander Blair and the husband of Maggie Sim, deceased, have conveyed their interest in the land

to said Sarah A. Smith. The bill prays for an accounting of rents, profits, waste and sale of timber; that certain deeds which are clouds upon their title be canceled; that the defendants in error may be enjoined from committing further waste, and for general relief. The answer of the defendants in error denies all the material allegations of the bill, and alleges that they have been in the peaceable, adverse and exclusive possession of the premises for more than twenty years prior to the filing of the bill and have paid all the taxes thereon during that time, and that they have been in peaceable, adverse and exclusive possession of all of said premises under color of title for more than seven years prior to the filing of the bill and have paid all the taxes thereon during that time. The cause was heard before the chancellor and resulted in a decree dismissing the bill for want of equity. Plaintiffs in error have sued out this writ, seeking to reverse the decree of the circuit court.

The facts developed on the hearing were as follows: On September 3, 1870, John M. Crank and wife conveyed the 120 acres in question to Robert R. Blair and Sarah J. Blair, his wife. On November 17 of that year Robert R. Blair died intestate, leaving surviving him the said Sarah J. Blair, his widow, and certain children, all of whom, except the plaintiffs in error and Alexander Blair and Mary Murphy, have since died. Mary Murphy has not been heard of for more than twenty-five years and is presumed to be dead. Sarah J. Blair re-married, and on February 28, 1878, together with her husband, John W. Keel, in consideration of \$100, executed and delivered to Lewis W. Chrishman a warranty deed to said 120 acres of land, the granting clause of said deed being, in part, as follows, Keel and wife being the parties of the first part: "That the said party of the first part, for and in consideration of the sum of one hundred (\$100) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by

these presents does grant, bargain and sell, unto the said party of the second part, his heirs and assigns, all the following described lot, piece or parcel of land situated in Grandpier precinct, in the county of Pope and State of Illinois, to-wit: The south-east fourth of section 16, township eleven (11), range seven (7), east, containing one hundred and twenty acres (120a.) This deed is only to remain in full force and effect during the lifetime of the above named Sarah J. Keel and at her death it goes back to her heirs. Together with all and singular the hereditaments and appurtenances hereunto belonging," etc. By sundry conveyances George J. Carter on June 27, 1882, derived this title from Chrishman, one of the deeds in the chain of conveyances containing the same language as that above quoted in the deed from Mrs. Keel to Chrishman, the other deeds in the chain being in the regular form and making no attempt at restriction. At the October term, 1883, of the circuit court of Pope county, and while the title conveyed to Chrishman was held by George J. Carter, the children of Robert R. Blair obtained a judgment in ejectment against Carter for the recovery of an undivided one-half of said land in fee and for the possession of the same. On December 10, 1887, Carter conveyed the said land to John Tucker by warranty deed. This deed was never recorded and its existence was evidently unknown to the plaintiffs in error until the time of the hearing on the bill herein. On June 20, 1885, Alexander Blair, Maggie Sim (now deceased) and said Sarah A. Smith, all children of Robert R. Blair, for the expressed consideration of \$15, conveyed to D. G. Thompson all their interest in the undivided one-half of said 120 acres and all their reversionary interest in the other undivided one-half. Thompson conveyed to one William King, who on December 24, 1888, conveyed to said John Tucker. This deed from King to John Tucker has never been recorded. On November 16, 1891, John Tucker contracted with his brother, William A. Tucker, to sell to

him the 120-acre tract, together with the remaining 40 acres of that quarter section, for the sum of \$200, and executed and delivered to him a bond for deed, binding himself to convey the land to William A. Tucker upon the payment of four notes then given to the obligor, aggregating \$200. This bond for deed has never been recorded. Upon the execution and delivery of the bond for deed on November 16, 1891, William A. Tucker took possession of the premises, and he and Daniel Tucker, another brother, have been in possession of the same from that time to the time of the filing of this bill, in 1908.

The evidence does not disclose whether William A. Tucker has complied with the terms of the contract of sale made between him and John Tucker, or has paid any of the promissory notes mentioned in the bond for deed or any interest thereon. It does appear, however, that William A. Tucker has never received a deed to the premises, and his only right to possession has been under the bond for deed. John Tucker was not made a party defendant to the bill, and no attempt was made to bring him in by amendment when his interest was disclosed upon the hearing. The bill was evidently drawn upon the theory that William A. Tucker and Daniel Tucker, instead of John Tucker, had been the purchasers from Carter and King, respectively. Carter and the Tuckers were brothers-in-law, and William A. Tucker and Daniel Tucker both knew of the ejectment suit brought by the children of Robert R. Blair against Carter in 1883, and knew that the children of Robert R. Blair claimed to have an interest in this land. The bill was also drawn upon the theory that the deed from Sarah J. Keel to Chrishman conveyed only an estate for the life of Sarah J. Keel, and that upon the death of said Sarah J. Keel the estate of her grantees was extinguished, and that plaintiffs in error, being the owners of the fee, were entitled to the possession of the entire tract. The proof was made and the case tried upon this theory.

Plaintiffs in error insist that by the deed from Sarah J. Keel and her husband, Lewis W. Chrishman acquired only an estate for the life of Sarah J. Keel in the premises. Defendants in error, on the other hand, contend that this deed in apt language conveyed all of the title of Sarah J. Keel to Chrishman, his heirs and assigns, thereby creating in him an estate in fee simple in the undivided one-half of the premises. Plaintiffs in error rely, to support their contention, upon the words inserted in the deed after the description of the land, "this deed is only to remain in full force and effect during the lifetime of the above named Sarah J. Keel and at her death it goes back to her heirs."

Defendants in error contend, and their contention seems to have been sustained by the trial court, that this deed is controlled by the rule in *Shelly's case*, and that under said rule the deed conveyed a fee simple title to the grantees. This is a misapprehension. The rule in *Shelly's case* applies to wills or deeds conveying to the ancestor an estate of freehold, and in the same instrument an estate is limited, either mediately or immediately, to his heirs in fee. It will be noted that the estate conveyed to Lewis W. Chrishman is an estate *per autre vie*. There is no language in this deed purporting to convey a fee simple title to the heirs of the grantees which affords satisfactory reason for taking it out of the operation of the rule in *Shelly's case*. The limitation of the estate of the grantees in this deed is found in the granting clause and not in the *habendum*. The extent of the estate intended to be conveyed is not mentioned in the deed, except in the clause which limits its duration to the life of Sarah J. Keel. While the limitation in the *habendum* clause cannot restrict an estate to one for life where the language is repugnant to the granting clause, that rule has no effect where the extent of the estate, as here, is stated in the granting clause of the deed. Section 13 of our Conveyance act expressly excepts from its operation conveyances where an estate less than a fee is limited by

the express words of the deed. *Riggin v. Love*, 72 Ill. 553; *Welch v. Welch*, 183 id. 237.

Under this construction of the deed it is clear that the court below erred in dismissing the bill. It is also clear, from the proofs, that Nannie Jeffers owned some other interest in the land, the exact extent of which cannot be certainly determined from the proofs in this record, but upon another hearing the evidence may disclose the extent of such interest. The evidence fails to show any fraud in procuring the deed from Sarah A. Smith, Alexander Blair and Maggie Sim by D. G. Thompson. That deed was a valid conveyance.

Defendants in error asserted title in themselves and relied upon the Statute of Limitations. Prior to the time that William A. Tucker came into possession of the premises under his bond for deed John Tucker had been in possession, and the possession of John and William together extended over a period of more than twenty years. Whether or not John knew of the interest of the children of Robert R. Blair in this land does not appear, but it is shown that William and Daniel Tucker knew of their interest and also knew of the ejectment suit brought by them against Carter and its result. While William and Daniel Tucker have been in the possession of all of the lands in controversy since the date of the bond for deed and during that time have received all the benefits of said land, their possession was not so adverse as to amount to an ouster of their tenants in common and start the running of the Statute of Limitations. The testimony of both William and Daniel Tucker was to the effect that since they went into possession of this land their possession had been exclusive and peaceable; that they exercised acts of ownership and claimed to own all of the land; that they paid the taxes thereon regularly every year and that no other person claimed the premises adversely. This does not show an ouster of the other tenants in common and is not sufficient to show title by limi-

tation. (*Nicoll v. Scott*, 99 Ill. 529.) Defendants in error are not entitled to avail themselves of the defense of possession and payment of taxes for seven years under color of title. The bond for a deed is not color of title. *Rigor v. Frye*, 62 Ill. 507; *Davis v. Howard*, 172 id. 340; *Converse v. Calumet River Railway Co.* 195 id. 204.

For the error in dismissing the bill for want of equity the decree of the circuit court of Pope county is reversed and the cause remanded.

Reversed and remanded.

THE TOWN OF HARMONY, Appellant, vs. JOHN A. CLARK,
Appellee.

Opinion filed April 19, 1911.

1. HIGHWAYS—*fences determine width of highway not laid out under the statute.* Where a road is not originally laid out, under the statute, by the commissioners of highways, its width is to be determined by the fences built by owners on each side of the road, whether the road is claimed to exist by dedication or prescription.

2. SAME—*whether owner dedicated strip between hedge fence and rail fence is a question of fact.* Where a land owner plants a hedge several feet inside of a rail fence which separates his land from a road and subsequently removes the rail fence, the question whether he dedicated the strip between the hedge and the rail fence as a part of the road is a question of fact to be determined from all the facts and circumstances in the case, including the fact that hedge trimmings were allowed to accumulate thereon.

3. EVIDENCE—*when alleged error in not admitting evidence is harmless.* Alleged error in refusing to admit in evidence in a road obstruction case a certain order and a copy of a petition offered on the question of the width of the road is harmless where they could have no material influence on the result of the trial, the road not being one laid out under the statute, and the issue being whether a land owner, by removing the original rail fence after his hedge had grown, dedicated the strip between the fence and the hedge or suffered the public to acquire a prescriptive right therein.

APPEAL from the Circuit Court of Hancock county;
the Hon. HARRY M. WAGGONER, Judge, presiding.

SCOFIELD & CALIFF, (DAVID E. MACK, of counsel,) for appellant.

O'HARRA, O'HARRA, WOOD & WALKER, and HARTZELL & McCRORY, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court :

Appellant brought an action of debt in the circuit court of Hancock county upon the statute, against appellee, to recover the penalty provided for the obstruction of a public highway. The declaration averred that notice had been given appellee to remove the obstruction and a recovery was sought for continuing the obstruction after giving the notice. Issue was joined and the cause tried by a jury, resulting in a verdict and judgment in favor of the appellee. Appellant prosecutes this appeal to reverse that judgment.

The highway appellee is charged with obstructing runs east and west through the middle of sections 31, 32, 33, 34, 35 and 36, in the town of Harmony, Hancock county. It was never laid out by proceedings had under the statute and exists as a public highway only by prescription or dedication. There is no dispute between the parties as to there being a highway at the place in question and that it had existed for more than forty years. In 1861 Thomas G. Lyons became the owner of and removed upon the east half of the north-west quarter of section 35. The place of the alleged obstruction is the north side of the road at the south end of this eighty. Before Lyons became the owner of said eighty there was a road running through the middle of the sections before mentioned, fenced at the place in question on both sides with rail fences. In 1865 Lyons planted a hedge fence across the south end of his eighty and on the north side of the rail fence that separated his land from the road. He testified he planted his hedge as close to the rail fence as he could and have room enough between it and the rail fence to cultivate his hedge on the

south side with one horse and a plow. The rail fence did not run in a straight line, and the hedge was planted in a line that was not entirely straight but to some extent followed the course of the rail fence, the distance between the hedge and the rail fence being greatest at the east side of Lyons' eighty. The rail fence was allowed to stand until the hedge made sufficient growth to answer the purpose of a fence. From time to time, as the hedge grew, parts of the rail fence were removed, the last of it being removed about 1875. The proof shows very little work was done on the road by the road authorities. A ditch about the depth of a plow furrow was made on the north side of the traveled track, and one witness testified that by direction of the road authorities he mowed the grass and weeds along the side of the road up to the hedge fence, at one time. The traveled track of the road was somewhere near the middle of the space left between the original fences. In muddy times the road was a bad one, and people in traveling over it in vehicles would sometimes travel out of the traveled track on the north side of the ditch for a distance of about sixty rods of the east part of the road. Sixty rods west of the east line of the Lyons eighty the ditch washed so deep that it could not be crossed, and over that part of the road travel had to be on the south side of the ditch. Between the ditch and the hedge fence at that place brush and saplings grew up. Lyons sold the eighty-acre tract described about 1890 to his son, and some two years later his son sold it to appellee, who still owns it. In trimming the hedge fence the owner of the land would drop the brush on the south side of it and it accumulated there until five or six years before bringing this suit, when appellee, wishing to destroy the hedge, burned the brush and the hedge and built a wire fence south of the line of the old hedge fence. It is this wire fence that is alleged to be an obstruction in the highway.

The proof shows that at the east side of the appellee's eighty the wire fence is about eight feet south of the stumps of the hedge fence and at the west side of the eighty about four feet south of the stumps of the hedge. As the hedge was crooked between those points, at some places the distance between the hedge and the wire was less than three feet. The appellant contends that the road as it existed by prescription or dedication was sixty-six feet wide and thirty-three feet of it came off the south end of appellee's eighty acres. Measurements from stones supposed to mark the east and west half-section line through the sections mentioned, according to the proof of appellant, show that at the east and west sides of appellee's land the distance between his wire fence and the stones is twenty-nine feet and at one place between those points twenty-seven feet. By building his fence closer than thirty-three feet of the line of these stones appellant contends appellee obstructed the public highway.

As the road was not originally laid out under the statute by the commissioners of highways, its width would be determined by the fences built by the owners on each side of it, whether it existed by prescription or dedication. For the purpose of showing that the road was intended to be sixty-six feet wide, appellant offered in evidence an order spread upon the town clerk's records, made by the commissioners of highways in 1858. The order recited that a road on the east and west center line of sections 31, 32, 33, 34, 35 and 36 was then used as a public highway and had been so used for twenty years but it had never been recorded. It was therefore ordered that the road be ascertained, described and entered of record according to a survey which had been made under the direction of the commissioners, and the road was described as four rods wide. The court sustained appellee's objection to the offer of this evidence. Appellant also, after proving the loss of the original petition, offered in evidence a copy of a petition presented

to the commissioners of highways of Harmony township, dated February 12, 1908, signed by appellee and others, requesting that the width of the road through the sections mentioned, for a distance of four miles, be reduced from sixty-six feet to sixty feet. Objection by appellee to the introduction of this document was sustained and it was not permitted to be introduced in evidence. Aside from the rulings of the court in refusing to admit this proof and giving and refusing certain instructions the controversy here is wholly one of fact. The real question is, did appellee place his fence on land that had been dedicated to and accepted by the public as a highway, or on land that the public had acquired a highway over by prescription? In our opinion the rail fence on the north side of the road marked the boundary of the highway, and unless, when the rail fence was removed, the owner of the land dedicated the strip between it and the hedge fence or the public acquired a right to that strip by prescription and travel over it, the road never did extend to the hedge fence. Whether there was such dedication, or the right to the land was acquired by prescription, were questions for determination by the jury under all the facts and circumstances proven. It may be that under the facts these were debatable questions, but it cannot be said that under the evidence the jury were bound to find for appellant under both or either of said questions.

Lyons, who owned the land until 1890, set out the hedge fence in 1865. It is true, he testified he intended it for a permanent fence, but he also testified that he set it as close to the rail fence as he could and leave room to plow between the rail fence and the hedge with one horse. The proof further shows that in trimming the hedge the brush was dropped on the south side of it, and this practice was continued and the brush accumulated from time to time until shortly before the appellee built the wire fence, when he burned it for the purpose of destroying the hedge.

Three or four years before appellee built the wire fence a line of telephone poles was set along the south side of the hedge fence, and according to the proof the poles were set as close to the hedge as the brush piled on the south side would admit. The wire fence alleged to be an obstruction in the road is on the north side of this line of telephone poles. The evidence is not clear as to the exact location of the wire fence with reference to the old line of the rail fence, but from the descriptions given of the rail and hedge fences and the distance left between them, and the distance between the wire fence and the stumps of the hedge fence, which are still standing and show clearly its line, we think the conclusion is amply warranted that the wire fence is substantially on the line of the old rail fence. As we have said, the distance between the wire fence and the hedge is not uniform, because of the fact that the hedge fence was not built in a straight line. The greatest distance between the wire fence and the hedge is at the east line of appellee's eighty and is about eight feet. One witness testified on behalf of appellee that he measured the distance between every post in the wire fence and the hedge stumps throughout the entire eighty rods. He testified several posts were less than three feet from the hedge, and in this he was not contradicted by anybody who made measurements.

In our opinion the order of the commissioners of highways of 1858, and the copy of the petition of the commissioners of 1908 to reduce the width of the road, could have had no material influence on the result of the trial if they had been admitted in evidence, and the refusal of the court to admit them in evidence affords no ground for a reversal of the judgment, even if it be conceded that they were competent. Neither do we think there was any error in the giving or refusing of instructions.

In our opinion the verdict and judgment were warranted by the evidence, and the judgment is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. ISAAC BERNSTEIN, Plaintiff in Error.

Opinion filed April 19, 1911.

1. CRIMINAL LAW—*when prosecutor cannot be required to elect.* If two or more offenses charged in an indictment grow out of one transaction and are of such a nature that the defendant may be found guilty of both, the prosecutor will not be required to elect for which offense he will prosecute, and he will only be required to do so when the offenses charged are distinct and do not arise out of the same transaction.

2. SAME—*counts charging arson and burning goods to defraud insurance company may be joined.* Counts charging arson may be joined in the same indictment with counts charging the burning of goods to defraud an insurance company where the two offenses grow out of one and the same transaction.

3. SAME—*the trial judge must exercise discretion in examining witnesses.* While it is not ordinarily good practice for the trial judge, in a criminal case, to examine the witnesses, it may, under some circumstances, be his duty to do so, but in discharging that duty he must exercise discretion and not assume the functions of an advocate.

4. SAME—*State's attorney should rarely be permitted to cross-examine witnesses examined in chief by the court.* The practice of allowing the State's attorney to cross-examine witnesses who have been examined in chief by the court is not to be commended, and should not be indulged in unless it is shown that otherwise there may be a miscarriage of justice.

5. SAME—*court must exercise great care in expressing opinions.* Expressions of opinion by the trial judge in a criminal case are likely to have great weight with the jury, and great care must be observed by him to say nothing to the prejudice of either party.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. LOCKWOOD HONORE, Judge, presiding.

MAX LUSTER, (J. AMBROSE GEARON, of counsel,) for
plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAY-
MAN, State's Attorney, and W. EDGAR SAMPSON, (ROBERT
E. CROWE, of counsel,) for the People.

Per CURIAM: Plaintiff in error was indicted at the March term, 1910, of the criminal court of Cook county, on the charge of arson. The indictment contained six counts. The first three were drawn under section 13 of the Criminal Code, while the last three were under section 14. (Hurd's Stat. 1909, p. 746.) The first three, in varying form, charged him with arson in burning a building belonging to Otto Vogelmann; the last three, with feloniously burning or setting fire to certain goods and chattels contained in a certain building, with intent to defraud the Continental Insurance Company. Plaintiff in error was found guilty under the second count of the indictment, and, after motions for new trial were overruled, was duly sentenced. This writ of error was thereafter sued out.

Plaintiff in error moved to quash the indictment and that the State's attorney be required to elect upon which of the counts he would prosecute. These motions were overruled. It is now contended that the court erred in so ruling, as under the decisions of this court said two sections of the Criminal Code create separate and distinct felonies, (*Mai v. People*, 224 Ill. 414; *Elgin v. People*, 226 id. 486;) and that the accused cannot be tried for separate and distinct felonies under the same indictment. (*Kotter v. People*, 150 Ill. 441.) If two or more offenses grow out of one transaction and are of such a nature that the defendant may be found guilty of both, the prosecutor will not be required to elect for which offense charged in the indictment he will ask a conviction. He will only be required to elect when the offenses charged in the different counts are actually distinct from each other and do not arise out of the same transaction. (*People v. Weil*, 243 Ill. 208; *Goodhue v. People*, 94 id. 37; *Schintz v. People*, 178 id. 320.) It is obvious from this record that the offenses charged in the different counts grew out of one and the

same transaction. The trial court, therefore, did not err in overruling said motions.

It is further urged that the evidence did not justify the conviction. Plaintiff in error occupied the first floor of the building at 3443 Sheffield avenue, Chicago,—the front part as a tailor shop and the rear as living quarters. Two days before the fire he procured \$2000 insurance upon the stock of goods therein with the Continental Insurance Company of New York. The evidence tended to show that at the time he had on hand only a small amount of stock,—far less than the amount insured. The fire occurred Sunday afternoon, January 30, 1910. The day before this, plaintiff in error purchased a gallon of benzine, three pounds of venetian red and a paint brush. He testified that the night before the fire he had been painting his floor with a mixture of the benzine, venetian red and a small amount of oil from the sewing machine oil-can, working very late; that the next morning he got up late and did some work, and being tired laid down in the afternoon and went to sleep, and was waked up by being dragged out of the building by a man, who left him standing on the porch, outside; that he did not know who the man was. The evidence tends strongly to show that benzine mixed with venetian red and a small amount of machine oil will not make a paint. The firemen testified that after the fire they found a large charred space around the stove, and the stove, while it had a little fire in it, was cool, with nothing to indicate that a fire could have started from it; that there was no gas coming from any of the gas jets; that there was a furnace in the building but it had not been used for some time; that the front door of the shop was locked. One of the witnesses saw the flames coming out of the top of the front windows, and ran, with a number of other men, across the street to the building. He testified that he went around to the rear and saw plaintiff in error coming out of the back door, and that

no one else was there. The assistant fire marshal testified that he found plaintiff in error in the bakery shop next door, sitting in the corner, mumbling to himself, apparently crying, and that the hair on one side of his head was singed; that when asked whether he had any insurance, the plaintiff in error first said he did not know, and later said he thought he had \$2000 and that the value of the contents of the store and household furniture was about \$500. The plaintiff in error denies that he made this statement and claimed that the contents of the store were worth \$2000. In filing his claim with the insurance company he valued the property at \$2703.02. While the evidence as to the origin of the fire was almost all, if not entirely, circumstantial, we think it justified the jury in finding plaintiff in error guilty, and we would not disturb the verdict if no errors had been committed on the trial.

It is insisted that the trial court committed reversible error in asking numerous questions of the plaintiff in error and his witnesses. Ordinarily it is not good practice for the presiding judge himself to examine witnesses at length. The circumstances may be such in a given case as to justify the court in so doing. (*Carle v. People*, 200 Ill. 494.) This court, however, has more than once said that the examination of witnesses is the more appropriate function of counsel, and the instances are rare and the conditions exceptional which will justify the presiding judge in conducting an extensive examination. It is always embarrassing for counsel to object to what he may deem improper questions by the court. Then, in conducting a lengthy examination it would be almost impossible for the judge to preserve a judicial attitude. While he is not a mere figurehead or umpire in a trial and it is his duty to see that justice is done, he will usually not find it necessary to conduct such examinations. The extent to which this shall be done must largely be a matter of discretion, to be

determined by the circumstances of each particular case, but in so doing he must not forget the function of a judge and assume that of an advocate. (*O'Shea v. People*, 218 Ill. 352; *Dunn v. People*, 172 id. 582.) In this case, also, the trial judge examined two witnesses in chief and allowed the State's attorney to cross-examine. We find nothing in the record explaining why this was done. Such a practice is not to be commended, and can only be permitted when it is shown that otherwise there may be a miscarriage of justice. We are convinced that in the examination of the witnesses by the trial judge, doubtless unconsciously on his part, he made statements and asked questions in such a form as would almost certainly lead the jury to conclude that he thought the plaintiff in error was guilty. We are impressed from a reading of the record that the questions of the judge would appear to the jury to be in the interest of the prosecution. Expressions of opinion by the judge are liable to have great weight with the jury, and therefore especial care should be observed that nothing be said by him to the prejudice of either party. *Lycan v. People*, 107 Ill. 423; *Synon v. People*, 188 id. 609; *South Covington and Cincinnati Street Railway Co. v. Stroh*, 57 L. R. A. (Ky.) 875, and note.

The evidence in this case as to the guilt of the plaintiff in error is of such a nature that we are constrained to hold that plaintiff in error was prejudiced by the remarks of the judge and his method of examining the witnesses. It is unnecessary to consider the other errors assigned.

The judgment of the criminal court of Cook county will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JOSEPH A. BLACK, Appellant, *vs.* THE HOOPESTON GAS AND
ELECTRIC COMPANY, Appellee.

Opinion filed April 19, 1911.

1. **STATUTE OF FRAUDS**—*Statute of Frauds is for the prevention of frauds.* A court of equity will not permit the Statute of Frauds to be used for the perpetration of a fraud, and will therefore enforce an oral contract which has so far been performed by one party that to permit its repudiation by the other would accomplish a fraud.

2. **SAME**—*oral contract may be taken out of Statute of Frauds by part performance.* An oral contract for the sale of real estate may be taken out of the Statute of Frauds by the payment of purchase money, the taking of possession and the making of lasting and valuable improvements; but these acts of performance must have been done by virtue of the contract sought to be enforced and for the purpose of performing it.

3. **SAME**—*mere holding over by tenant is not a part performance of oral contract to convey.* The mere continuance of possession by a tenant after the expiration of his lease is not a part performance of an oral contract by the lessor to convey the land; but the question whether such possession is under the contract or the lease is one of fact.

4. **SAME**—*tenant not required to surrender possession to change its character.* It is not necessary that a tenant surrender possession upon the termination of his lease in order to change the character of his possession from lessee to that of a vendee under an oral contract of sale; but that question is to be determined from all the circumstances, including his expenditure of money in making improvements.

5. **SPECIFIC PERFORMANCE**—*bill need not aver that corporation's contract was authorized.* A bill for the specific enforcement of an oral contract made by a corporation for the sale of land need not allege that the contract was authorized by the board of directors, although the complainant must prove authority if it is denied by the defendants.

6. **SAME**—*when the description in a contract is not indefinite.* Where an oral contract for the conveyance by a lessor to a lessee of a certain portion of a tract of land owned by the lessor describes the tract to be sold as 427.5 three-thousandths of the said land, to be located in the south part thereof and to include the lessee's temporary buildings and be bounded on the north by a line parallel with a designated street, the description is not indefinite,

since the parallel line referred to must be the one which will have south of it 427.5 three-thousandths of the tract owned by the lessor.

7. SAME—*bill need not allege that the complainant has not received anything else in lieu of deed.* Where a bill for specific performance alleges that the defendant agreed to convey certain land to him as part payment for services performed, it is not necessary that the bill allege that complainant has not received anything else in lieu of the deed, as the allegation and proof as to such fact, if it exists, should come from the defendant.

APPEAL from the Circuit Court of Vermilion county;
the Hon. W. B. SCHOLFIELD, Judge, presiding.

J. C. McCLURE, for appellant.

J. H. DYER, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

A demurrer was sustained to appellant's bill for specific performance, his bill was dismissed and he has appealed.

It appears from the bill that the appellee was the owner of a triangular lot of land, of a portion of which the appellant was in possession as a tenant holding over under an oral lease from a former owner, on which portion he had erected a building. The appellee employed the appellant to do some concrete work for \$855, one-half of which was to be paid in cash and for the other half (\$427.50) the appellee agreed to convey to the appellant 427.5 three-thousandths of the said lot of land, to be located in the south part thereof, to include appellant's building and to be bounded on the north by a line parallel with Seminary avenue. The contract was oral. The appellant performed the work to the satisfaction and acceptance of the appellee, and, relying upon the contract, entered into possession of the premises with the knowledge and approval of the appellee, enlarged the building, changing it from a temporary to a permanent structure, made lasting and valuable improvements on the premises, and has ever since remained

in the exclusive possession of such premises as owner, but the appellee has refused to convey them to him. The demurrer relied upon the Statute of Frauds, and it is insisted that the appellant did not enter into possession under the contract; that there is no sufficient part performance to avoid the statute; that it does not appear that there was any legal contract on the part of the appellee, and that the contract is indefinite and uncertain.

The Statute of Frauds is for the prevention of frauds. Equity will not permit it to be used for the perpetration of fraud, and will therefore enforce an oral contract which has been so far performed by one party that to permit its repudiation by the other would be a fraud. The law is well settled that an oral sale of real estate may be taken out of the statute by the payment of the purchase money, the taking of possession and the making of lasting and valuable improvements. These acts of performance, however, relied upon to take a case out of the Statute of Frauds, must have been done by virtue of the contract sought to be enforced and for the purpose of performing it. (*Koch v. National Union Building Ass'n*, 137 Ill. 497.) The appellee does not question the allegation as to the performance of the work which was the consideration of the contract or as to the making of improvements, but it insists that it appears that the appellant's possession was not taken under his contract with the appellee but was only a holding over under his lease from a former owner. The mere possession of a tenant after the expiration of his lease is not a part performance of an oral contract to convey the land to him. (*Koch v. National Union Building Ass'n*, *supra*.) However, whether such possession is a holding over under the lease or is a possession under the contract of sale is a question of fact. It is not absolutely necessary that the tenant shall have actually surrendered the possession under his lease and re-entered under the contract, but all the circumstances tending to characterize his possession are to be

considered, and among others his expenditures, if any, in making improvements on the faith of an oral agreement which he would not otherwise have made. (*Morrison v. Herrick*, 130 Ill. 631.) The bill averred that the appellant's possession was under the contract, and the truth of this averment must depend upon the proof.

It is urged by the appellee that the bill is defective because it does not show that the alleged contract was authorized by the appellee's board of directors. It is not necessary to allege all the preliminary details involved in the making of a contract. The bill avers that the appellee entered into an oral agreement with the appellant, and this allegation is sufficient. If it is not admitted the complainant will have to prove an agreement made by lawful authority in order to sustain it.

The appellee insists that the contract is not definite in its description of the land to be conveyed, because it provides that "the northern portion of said portion so to be set off was to be bounded by a line running parallel with the center of Seminary avenue." It is said that it thus appears that the land included in the oral contract was not to extend north of a line parallel with the center of Seminary avenue, while it appears by the plat attached to the bill as an exhibit that the appellant is seeking a conveyance of land extending a considerable distance north of a line parallel with the center of Seminary avenue. There are, of course, an infinite number of lines parallel with the center of Seminary avenue, some north and some south of it, but the particular line referred to in this agreement is that one which has south of it 427.5 three-thousandths of the tract described in the bill. There is no uncertainty in the description.

Another objection urged to the bill is, that it does not allege that the appellee has not paid the appellant the full amount due for his work. The only thing due appellant for his work, according to the averments of the bill, is a deed

for this tract of land. It is not necessary for him to aver that he has not received something else in lieu of it. If he has, the allegation and proof should come from appellee.

The decree is reversed and the cause is remanded to the circuit court, with directions to overrule the demurrer to the bill.

Reversed and remanded, with directions.

GEORGE B. STITZEL *et al.* Appellees, *vs.* LOREN B. MILLER,
Admr. Appellant.

Opinion filed April 19, 1911.

1. *BILLS AND NOTES—promissory note defined.* A promissory note may be defined as a written promise by one person to pay to another person named therein, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive; and this definition substantially meets the requirements of the Negotiable Instruments act of 1907.

2. *SAME—provision for extension of time after maturity does not render note non-negotiable.* A provision in a promissory note that "in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from payment hereof," does not render the note non-negotiable, as the negotiability of a note, for all practical purposes, ends when it is due.

3. *SAME—when purchasers may maintain action in their own names.* If a note is negotiable, the endorsement of the name of the payee on its back and its sale and delivery to purchasers authorizes such purchasers to maintain an action in their own names against the administrator of the deceased maker.

4. *EVIDENCE—when genuineness of signature cannot be proved by comparison.* The genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures which are not admissible in evidence for other purposes or not already a part of the record; but comparison may be made by the jury, with or without expert testimony, when other writings or signatures admitted to be genuine are already in the case.

5. *SAME—fact that signatures are exactly alike is evidence that one was traced.* The fact that two signatures are exactly alike is

evidence that one was traced or otherwise reproduced from the other or that both were reproduced from still another.

6. *SAME*—when evidence to show that signatures are *fac similes* is admissible. Where it is claimed by the administrator in a suit against him on a note that the signature of the deceased was forged, another note purporting to be signed by the deceased, and one payable to and purporting to bear an endorsement by him, may be introduced in evidence, together with the testimony of experts, to show that the three signatures are *fac similes*, without violating the rule against proving handwriting by comparison.

7. *SAME*—photographic copy of a note is admissible if proper foundation is laid. If a proper foundation is laid by showing that the original instrument, bearing a signature which is desired to be used in evidence, is in the files of a case in a court of another State and that permission to withdraw the instrument has been denied and that it cannot be produced, a photographic copy, shown to be accurate, is admissible.

8. *SAME*—what evidence not competent as tending to prove an admission that note was good. In an action against an administrator on a note purporting to be signed by the intestate, evidence that the purchaser, at the time he was negotiating for the note, showed it to the defendant and his brother, who were sons of the supposed maker, and asked them if the note was all right and that they made no reply, is not admissible, as their statements or admissions would not be binding upon the other heirs-at-law.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lee county; the Hon. R. S. FARRAND, Judge, presiding.

TRUSDELL, SMITH & LEECH, for appellant.

H. A. BROOKS, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is a suit in assumpsit brought by appellees in the circuit court of Lee county against appellant upon a promissory note dated February 22, 1908, payable one year after date to Harrison Miller and by him endorsed in blank and sold and delivered to appellees. This note was for the principal sum of \$6500, with interest at six per cent, and

purported to be signed by D. C. Miller. The appellant filed a special demurrer, charging that the suit was prematurely brought and the note non-negotiable. On the demurrer being overruled the appellant pleaded non-assumpsit, with a verification denying execution of the instrument. Upon a jury trial appellees obtained a verdict for \$7140.25. From the judgment entered thereon an appeal was prayed and allowed to the Appellate Court for the Second District. That court affirmed the judgment of the trial court and granted a certificate of importance. This appeal followed.

The original instrument sued on has been certified to this court. A printed blank prepared for the Stocking Trust and Savings Bank was used in making it. Everything is in print except the date, names, amount, time when payable and the rate of interest. The first part is printed in large type and is the ordinary form of promissory note. A power of attorney to confess judgment follows in fine print, and thereafter, in like print, the following: "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof." It is urged that the quoted words render the instrument non-negotiable. This court has held that a promissory note "may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive." (*McClenathan v. Davis*, 243 Ill. 87.) This definition substantially meets the requirements of the Negotiable Instrument act of 1907. The contention that said quoted words gave the holder the authority to extend the note as he pleased; that it could not be known what extensions he might grant, and that therefore the time when the note became due and payable was uncertain and indeterminate, rendering the note non-negotiable, cannot be

sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity. The time of payment is certain. The note is dated February 22, 1908, and payable one year thereafter. After a note is due its negotiability, for all practical purposes, is at an end. In *Dorsey v. Wolff*, 142 Ill. 589, it was held that a provision in a note that if it was not paid when due and suit was brought thereon the maker should pay an attorney's fee of ten per cent, recoverable either in such suit or a separate action, did not destroy the negotiability of the note as it did not take effect until after maturity. Numerous authorities are cited from this and other States by counsel for appellant on this question. In most of them the note recites that the payee reserves the right of option of extension at any time, either before or after maturity, and we do not consider them in point. The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note. The following authorities in other jurisdictions tend to uphold this conclusion: *National Bank v. Kenney*, 98 Tex. 293; *First Nat. Bank v. Buttery*, 16 L. R. A. (N. S.) N. Dak. 878, and note; *Farmer, Thompson & Helsell v. Bank of Graettinger*, 107 N. W. Rep. 170; *Anniston Loan and Trust Co. v. Stickney*, 31 L. R. A. (Ala.) 234, and note. The note being negotiable, the endorsement of the name of the payee on its back and its sale and delivery to appellees authorized them to maintain this action in their own names. *Kistner v. Peters*, 223 Ill. 607; *Keenan v. Blue*, 240 id. 177.

The note matured February 22, 1909. The suit was begun December 19, 1908. The first summons not being served, a second was issued January 23, 1909, and served March 10 of the same year. It is insisted that the suit was prematurely brought. Without question there cannot be

any recovery on an ordinary common law action if the money is not due at the institution of the suit. (*Bacon v. Schefflin*, 185 Ill. 122, and cases cited; 1 Ency. of L. & P. 1082.) We think this question was not properly preserved for review.

It is further insisted that the trial court erred in refusing to admit certain other notes for the purpose of showing that the signatures thereon and the signature on the note at issue were *fac similes*. The evidence shows that appellees purchased the note in this suit from Harrison Miller, and at the same time bought of him another note for \$4500, also dated February 22, 1908, purporting to be executed by Lafayette Miller and D. C. Miller, payable to the order of Harrison Miller and by him endorsed. Evidence was also offered tending to show that a suit had been brought in the district court of Scott county, Iowa, by L. C. Miller against Ella Quinn, executrix of the estate of James Quinn, deceased, upon a promissory note dated at Davenport, Iowa, September 14, 1907, for the sum of \$15,000, purporting to be executed by James Quinn and payable to the order of D. C. Miller, bearing upon the back thereof the purported endorsement in blank of D. C. Miller; that in the said district court of Iowa the name of James Quinn was held to be forged; that appellant had asked but had been refused leave to withdraw said note from the files of that court for use in this trial; that a correct photographic copy, of natural size, had been procured of this note and the back thereof; that on the trial of said case in Iowa the testimony showed that the writing filling up the blanks on the face of that note was in the hand of Harrison Miller. Counsel for the appellant offered said \$4500 note and the photograph of the \$15,000 note in evidence, and offered to prove by an expert that the purported signature of D. C. Miller on the note here in question, and on said \$4500 note, and on the back of the \$15,000 note, (as shown by the photograph,) were identical in every particular and if

superimposed would exactly coincide. The court refused to permit this evidence to be introduced. It is insisted that if these facts had been shown the conclusion would necessarily have been drawn that the three alleged signatures of D. C. Miller were all tracings from the same signature. This court has laid down the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes or not already a part of the record. When, however, other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury, with or without experts. *Himrod v. Gilman*, 147 Ill. 293; *Rogers v. Tyley*, 144 id. 652; *Bevan v. Atlanta Nat. Bank*, 142 id. 302; *Riggs v. Powell*, 142 id. 453; *Brobston v. Cahill*, 64 id. 356; *Jumpertz v. People*, 21 id. 375; *Massey v. Farmers' Nat. Bank*, 104 id. 327.

Counsel for appellant strenuously insist that the offered evidence does not come within the reasoning of the decisions in this State; that this rule against comparison of handwriting only applies where it is sought to show that a signature is like the typical signature of another. A witness who has seen another write is competent to testify, as is also one who has acquired a knowledge of the other's handwriting by correspondence or in the ordinary course of business. (2 Jones on the Law of Evidence, secs. 559, 561; 1 Greenleaf on Evidence,—Lewis' ed.—sec. 577.) In a sense all evidence of handwriting is in the nature of comparison, except where the witness saw the act of writing. The general rule of the common law was, that proof of handwriting by comparison, by placing the documents in juxtaposition, was not permissible. There were, however, two exceptions that were as well recognized as the rule itself: First, where writings otherwise irrelevant, offered for the mere purpose of comparison, were admitted when the writing in issue was so ancient as not to admit

of proof from knowledge derived from seeing the party write; and second, where other writings were legitimately in the case for other purposes. (15 Am. & Eng. Ency. of Law,—2d ed.—265; 3 Wigmore on Evidence, sec. 1991; 1 Greenleaf on Evidence,—Lewis' ed.—sec. 578.) The tendency of legislation, as well as of judicial decisions, is to relax this rule and to enlarge upon its exceptions, or, rather, to permit a more liberal use of comparison with any writing established to be the writing of the party whose handwriting is in issue, whether the writing is otherwise relevant or not. The rule has been so enlarged in England by statute in 1854 and also by statute in various States in this country. (15 Am. & Eng. Ency. of Law,—2d ed.—265, 269; see an exhaustive review of this subject in note to *University of Illinois v. Spalding*, 62 L. R. A. [N. H.] 817.) The reason generally given for permitting a comparison with writings already in evidence is, that it is better to permit the jury to use such papers for this purpose, under proper instructions, than to confuse them with impracticable distinctions as to their use. The objections originally urged for rejecting proof by comparison of hands were three in number, namely: (1) Illiteracy of jurors; (2) danger of fraud and bias in the selection of a standard of comparison; (3) danger of multiplicity of collateral issues arising from necessity of making proof of the genuineness of the standard. The first objection has long been obsolete. (3 Wigmore on Evidence, sec. 2002.)

Assuming that counsel for the appellees is right in contending that this evidence would involve the principle of a comparison of handwriting, would its admission be in conflict with the decisions of this court on this question? This court has never decided the precise issue here raised, and so far as we are advised the rule insisted upon by appellees has never been enforced where the facts were similar to those in this case. Indeed, in the record that we have of the celebrated *Howland will case*, 4 Am. L. Rev. 625, the

trial court there seems to have gone much further in the admission of evidence bearing on traced or forged signatures than is here contended for by the appellant. In discussing the question of the comparison of handwriting by bringing the documents into juxtaposition, Chief Justice Shaw, in *Moody v. Rowell*, 17 Pick. 490, said: "It seems to be difficult to distinguish, in principle, between the case of a paper admitted or proved to be genuine, given in evidence for another purpose, and a paper, the genuineness of which is equally well established, when offered for this express purpose. In both cases the result depends upon skill and judgment in making the comparison and discovering the resemblances and differences." The dangers arising from the admission of such papers are greatly minimized where the writings admitted are conceded by the opposite party to be genuine or he is estopped from denying them. (1 Greenleaf on Evidence, sec. 581.) If such comparison will lead to the ends of truth and justice when the papers are admitted in evidence for other purposes, there is much force in the argument that any evils that may be suggested as arising from the selection of particular writings for the purpose of comparison may be left, as all such evidence must be, to be corrected by other evidence or the individual judgment of the jury. (*Morrison v. Porter*, 35 Minn. 425.) In *University of Illinois v. Spalding*, *supra*, it is said (p. 825): "It may be safely stated as a fundamental proposition that on the question whether a given signature is in the handwriting of a particular person, comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities thus disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of the person's handwriting existing in the mind and derived from direct acquaintance, however little, with the party's hand-

writing." That this court concurs in this reasoning is shown in *Greenebaum v. Bornhofen*, 167 Ill. 640, where, in discussing the evidence as to comparison of handwriting, it was said (p. 645): "In considering the issue the court might, and should, compare the signatures of the papers so in evidence, as a means of determining whether the disputed signatures were genuine. * * * Of this means of determining the truth the Appellate Court and this court are deprived. That it was a most important and valuable aid is certain. It may have afforded the most convincing proofs that the signatures were genuine."

While we are not disposed to overrule or set aside the holdings of this court as to the comparison of writings placed in juxtaposition, we are convinced that on reason and authority the rule should not be made more rigid. On the contrary, it should be liberally construed, so as to serve as an "important and valuable aid" in determining the genuineness of signatures. The reason of the rule is not against the comparison of the signatures in different documents by bringing them together in order to show the genuineness or falsity of the signature, but it is against the selection of a false standard as the characteristic type or style of handwriting and bringing before the jury collateral issues. No danger of unfairness of selection could arise from the introduction of the offered evidence. If the signatures offered are *fac similes* they cannot vary. They would be like the work of a printing press or typewriter when working accurately. There would be no opportunity for an arbitrary selection and no chance to choose between the signatures of different kinds. Only signatures that are identical can be of any value for the purpose for which these documents were offered. The proof of *fac simile* signatures can hardly raise collateral issues. In attempting to prove a disputed signature by a genuine typical one the standards offered may be innumerable, and each one offered must be proved to be genuine or its genuineness admitted.

Not only must the standards be shown to be genuine, but their weight as evidence will depend upon whether they are typical. No such danger is liable to arise in attempting to prove *fac simile* signatures. The number offered must, in the nature of things, be limited. A comparison to establish a type of handwriting differs from a comparison to reach a conclusion as to whether two signatures are identical. The two methods of comparison are clearly distinguishable. In seeking to prove that signatures are identical in every respect, the object of the comparison is precisely the opposite of that usually sought. In other words, in the ordinary case of comparison it is sought, from the similarity or dissimilarity of the disputed writing compared with the genuine one, to show whether the disputed writing is genuine or a forgery, while in a case like this it is sought to prove the forgery of a signature by establishing the fact that the disputed signature is so nearly identical with other signatures that it must be a forgery,—that is, that the disputed signature was traced from another by some process. The authorities generally agree that no two signatures of an individual written in a natural way will be the same in all respects. The fact that two signatures are exactly alike is accepted as strong evidence that one was traced or otherwise reproduced from the other or that both were made from still another signature. *Day v. Cole*, 65 Mich. 129; *Kemp v. Mackrill*, Sayre, (K. B.) 130; *Hanriot v. Sherwood*, 82 Va. 1; *Taylor will case*, 10 Abb. Pr. (N. S.) 300; *McDonough's Succession*, 18 La. Ann. 419; 1 Moore on Facts, sec. 607.

The disputed evidence did not involve the doctrine of the comparison of hands in the sense in which that rule has been followed in this State. The offered proof is similar in some respects to that which was held competent in *Brooks v. Tichbourn*, 14 Jur. 1122, to show that Brooks was the author of a disputed writing in which the name of Tichbourn was misspelled "Titchbourn." Other letters of Brooks were

offered in the lower court in which the name was misspelled in the same way. The reviewing court said: "It was objected, however, that the mode of proof of that habit was improper, and that the habit should be proved as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write or corresponded with him. But we think that is not like the case of the general style and character of handwriting. The object is, not to show the similarity of the form of the letters and mode of writing a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelt it in a different way from others, or written it in that way once or oftener, in any sort of characters,—the more frequently the greater the value of the evidence. For that purpose one or more specimens written by him with that peculiar orthography would be admissible."

It has never been doubted that the authorship of a writing might be shown by other circumstances than the likeness or unlikeness of one handwriting to that of another, as by the character of spelling or style of composition. Such a fact does not come within the rule governing proof as to the likeness or unlikeness of handwriting. Proof of such peculiarities may be made in any way that would be appropriate in other cases. In *Pate v. People*, 3 Gilm. 644, the prosecuting witness, Randall, testified that a receipt and contract described in an indictment were never executed by him, and he proceeded to point out wherein the style of writing and spelling differed from his own. For the purpose of contradicting him the prisoner introduced other papers written and signed by Randall which corresponded in these particulars with the documents alleged to be forged. The court held that this evidence was proper, and that the prosecution then had the undoubted right to rebut this testimony and sustain Randall by show-

ing that the papers introduced by the prisoner and traced to his possession previous to the trial were originally written as stated by Randall but had since been made to resemble the forged writings by alterations and erasures. Incriminating letters written on a typewriting machine, not signed, were offered in evidence against a defendant in a criminal case, their genuineness being shown by evidence that in the town where they were mailed a machine was found that had defects that would produce the same character of writings that were found in the letters. (*State v. Freshwater*, [Utah] 85 Pac. Rep. 447.) This court has held that it was proper to prove by an expert that two instruments were written by the same person, holding that the question was not whether the two writings resembled each other, but whether, in the opinion of the expert, they were written by the same person. (*Rogers v. Tyley*, *supra*.) In a prosecution under the United States statutes against the slave trade it became necessary for the prosecution to show the citizenship of the vessel employed for that purpose. The vessel had been originally owned by one Marsden and engaged in a legitimate business. Just prior to embarking in the slave trade it appeared to have been registered in the name of one Gray. The theory of the prosecution was that Marsden was still the real owner and that Gray was a fictitious person. The prosecution sought to prove this by showing that the name "Gray" on the register was a simulated one and not signed by Gray; that no such person as Gray lived. It was sought to prove this by introducing other signatures and comparing them with the name "Gray" signed on the register. The signatures introduced were not claimed to be genuine signatures of Gray but were ostensibly those of other persons connected with the vessel. It was claimed that they were all written by the same person, and the prosecution offered testimony of experts to that effect. It was argued that the rule regarding the comparison of hands applied and that the evidence

should not be admitted. The court, in overruling the objection, stated that if the purpose of the offer had been to show by comparison that the signature "Gray" was in the handwriting of defendant, it would be necessary to have in evidence, as a standard of comparison, the genuine signature of the defendant, but that the purpose there was to show the circumstance that all of these papers, ostensibly signed by different persons, were in fact written by the same person, and from this circumstance draw the inference that they were spurious and that "Gray" had not signed the registry. (*United States v. Darnaud*, 25 Fed. Cas. 14,918.) In *Anson v. People*, 148 Ill. 494, it was held competent to prove in a forgery case impressions of a notarial seal to show that the impression on the instruments purported to be forged was made by that same seal. The following authorities also tend to uphold the contention that the offered evidence did not strictly involve the doctrine of comparing hands, but was a species of circumstantial evidence to be admitted for the purpose of showing a plan to forge a series of notes or papers: *Blalock v. Randall*, 76 Ill. 224; *United States v. Chamberlain*, 25 Fed. Cas. 14,778; *State v. Webb*, (Utah) 56 Pac. Rep. 159; *Levy v. Rust*, 49 Atl. Rep. 1017; *Sudlow v. Warshing*, 108 N. Y. 520; *Tally v. Cross*, (Ala.) 26 So. Rep. 912; *Balcetti v. Serani*, Peake's Cas. 192; 1 Wigmore on Evidence, secs. 304, 315, 318.

Fac simile signatures necessarily resemble the genuine signature of the person. Honest witnesses must testify that the handwriting is similar, and many will be constrained to testify that the purported signature is genuine. If evidence of the nature here offered be excluded, the reputed signer being dead, frequently the best evidence that could be produced to show a traced signature would be excluded. It could hardly be said that any better evidence could be offered to show that a signature was a *fac simile*, except that of persons who actually saw the tracing done.

The admission of the testimony offered would not, in our judgment, conflict with the rule heretofore laid down by this court as to comparison of handwriting by documents placed in juxtaposition, and we are not disposed to extend that rule so as to preclude, under proper restrictions, this character of testimony.

As we understand the record, proper proof was made that the original note for \$15,000 sued on in Iowa could not be produced on this trial, and the photographic copy, preliminary proof as to its accuracy having been made, was proper evidence. (Rogers on Expert Testimony,—2d ed.—336.) This photographic copy of the \$15,000 note and the original note of \$4500 should have been admitted in evidence for the purpose of aiding the jury in reaching a conclusion as to whether the three signatures in question were all *fac similes*. These writings being admissible, expert testimony was permissible to aid in deciding as to whether they were *fac similes*. *Rogers v. Tyley, supra*; 15 Am. & Eng. Ency. of Law, (2d ed.) 276; 2 Jones on Evidence, sec. 570; *University of Illinois v. Spalding, supra*, note on p. 869.

Evidence is found in the record of an interview by one of appellees with Loren B. Miller, the administrator, and his brother, Clark Miller, when appellees were negotiating for the purchase of the two notes of \$6500 and \$4500, to the effect that said appellee showed the notes to the two Millers and asked them if they were all right, and they made no reply. We think this evidence was incompetent and should have been excluded. The two Millers could not bind the other heirs-at-law by any admissions or statements they might make.

We find no error in the giving and refusing of instructions.

The judgments of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court for further proceedings not inconsistent herewith.

Reversed and remanded.

THE MERCHANTS LOAN AND TRUST COMPANY *et al.* Appellees, *vs.* THE NORTHERN TRUST COMPANY *et al.*—
(MARSHALL FIELD *et al.* Appellants.)

Opinion filed April 19, 1911.

1. TRUSTS—*power of trustees to "vary" investment is power to change it from one form to another.* Where trustees are given uncontrolled discretion in the management of the estate, with full power "to invest and re-invest the same and to vary the securities and property," they have power to change the form of an investment from one thing to another.

2. SAME—*creator of trust may designate how investment may be made.* The creator of a trust may designate how the investment may be made by the trustees and what security may be taken or that the security may be dispensed with, and the trustees will be bound by such directions.

3. SAME—*intention of the testator is primary object to be ascertained in determining powers of trustees.* The intention of the testator is the primary question in determining the authority and powers of testamentary trustees.

4. SAME—*whether testamentary trustees can invest in real estate in Illinois depends upon the testator's intention.* Whether the trustees under a will can invest the trust funds in real estate in Illinois depends upon the testator's intention as gathered from the entire will, having in mind the duration of the trust, the amount of the estate and the specific directions as to the management and investment of the trust estate.

5. SAME—*purpose of the act of 1905, relating to investments by trustees.* The purpose of the act of 1905, (Hurd's Stat. 1909, p. 2252,) relating to investments by trustees, was to provide for investments where the instrument creating the trust does not otherwise provide, and it was not intended to prevent other investments by trustees under authority of the instrument creating the trust.

6. SAME—*when trustees are not restricted to investments authorized by law.* Where a will gives authority to trustees to convert real estate into personal property and personal property into real estate and to invest and re-invest, in their discretion, the trustees may make such investments as a prudent person would consider safe, and they are not restricted by the conditions and limitations imposed by law on the investment of trust funds.

7. SAME—*investment of trust funds in land in other States is not against public policy.* It is manifest from the act of 1905, re-

lating to the investment by trustees in securities, that it is not against the public policy of the State for trustees domiciled in Illinois to invest trust funds in lands in other States.

8. SAME—*public policy of State concerning investment of trust funds does not extend to foreign countries.* The public policy of Illinois, as evidenced by the act of 1905, is limited to the investment of trust funds in other States of the Union and does not extend to investments in foreign countries.

9. SAME—*when trustees may purchase increase in capital stock of corporations.* Where the trust estate is partly invested in the stock of corporations and the trustees are authorized to continue to hold any investment received by them under the trust "or any increase thereof," the trustees may purchase their *pro rata* share of any increase of capital stock offered to them by the corporation, at less than market value, by reason of their ownership of stock in such corporation as trustees of the estate.

10. SAME—*trustees must always act in the utmost good faith.* Trustees under a will, whatever may be the extent of their power and authority, must always act in the utmost good faith and with sound judgment and prudence.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

HOLLAND & ELLIOTT, for appellants.

WILSON, MOORE & MCILVAINE, and ISHAM, LINCOLN & BEALE, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellees, as testamentary trustees of the residuary estate of Marshall Field, deceased, filed their bill in the circuit court of Cook county for a construction of the will of Marshall Field in so far as it relates to their powers of investment of the residuary estate in certain forms of property. The circuit court entered a decree construing the will, and an appeal was thereupon prayed to this court. We were of the opinion that a freehold was not involved

and transferred the cause to the Appellate Court for the First District. (245 Ill. 511.) That court affirmed the decree of the circuit court and granted a certificate of importance to this court. This appeal followed.

The will in question, after disposing of a considerable portion of testator's estate by specific bequests, created a trust as to the residue, primarily for the benefit of two grandsons, continuing until 1943. This residuary estate is valued at not less than \$30,000,000. The estate consisted of real estate in Illinois, New York, Wisconsin and other States in the United States, and of personal property, including bonds, promissory notes, and stocks of railroad and industrial corporations incorporated either under the laws of Illinois or of other States of the United States. The powers of investment of the trustees of the said residuary estate are contained in the twenty-first and twenty-third articles of the will, which, so far as they bear directly on the subject, are as follows:

"Twenty-first— * * * I hereby give to and invest them and their successors and associates in trust with such powers over and such title and estate in and to the property in this will devised and bequeathed as may be necessary or convenient to carry into full effect my intentions and designs in the execution of this will and in the several devises, donations and legacies herein specified and made.
* * * I authorize my executors and residuary trustees, the survivors or survivor of them, and their successors, to sell and convert any or all of my real or personal estate, whenever in their judgment it shall be important or judicious to do so, for the purpose of paying legacies or making divisions and apportionments of my estate, or for any other purpose that may be required under this will. If at the time of my decease I shall be the owner of any lands, tenements or hereditaments situate, lying and being in any other State or country than the State of Illinois aforesaid, and the laws of such other State or country shall be such

that any of the provisions of this instrument shall or might be in conflict therewith or would be to any extent made ineffective or inoperative thereby, then it is my will and I direct that my executors and residuary trustees shall have the power and shall proceed forthwith to sell such lands and convert them into money or other personal property, and the proceeds of such sale shall be applied as the property sold and converted was directed to be. * * * While I do not wish to control or embarrass the discretion of my executors and residuary trustees, it is my desire that they shall retain for my estate the better class of securities, including mortgages, railroad or other corporate stocks or bonds and other securities in which they may find any part of my estate invested at my death, and that in selling or converting any securities they shall in the first instance dispose of such as in their judgment shall seem to be of the less substantial and enduring value for the purpose of investment.

*"Twenty-third—*To the respective trustees of the several trust funds or estates created by this my will I give and devise full powers of management and control of the respective trust funds or estates, to invest and re-invest the same, and to vary the securities and property in which, from time to time, such trust funds or estates may be invested, and to let and demise any lands and tenements at their discretion, respectively; but in making leases it is my desire that preference be given to leases for long terms rather than shorter ones, not exceeding, however, except in cases of ground leases for building purposes, the period of twenty (20) years. The respective trustees are authorized and empowered to sell, transfer and convey any of the trust property for the purpose of re-building or for re-investment. * * * It is my desire that the respective trustees shall give a preference, whenever it may be practicable to do so, to the making of ground leases instead of sales of lands under their powers of sale. * * * It is

my will and I direct that investments be made with reference to the security of the trust fund rather than the rate of interest or income to be derived from it, and that where real and personal property have been given in trust, a proper proportion be maintained between them. It has been my general intention to keep at least half of my property in real estate and the rest in personal property, but in this particular my trustees are to exercise their own discretion and act in each case as may, under the circumstances, seem best to them."

The decree found that the trustees had power, under the provisions of the will, first, to make investment of funds in their hands belonging to the residuary estate, in real estate situated in the State of Illinois and elsewhere in the United States; and second, out of the funds belonging to the residuary estate to acquire and pay for their *pro rata* share of any increase of the capital stock of any corporation which shall be offered to them, as trustees, by such corporation at a price less than its then market value, by reason of their ownership of shares of stock of such corporation which belonged to Marshall Field at the date of his death or which shall have come to them by reason of their ownership of stock belonging to said Marshall Field at the date of his death.

It is apparent that the testator intended to give his trustees uncontrolled discretion in the management of the estate, with full power "to invest and re-invest the same and to vary the securities and property." "To vary" means to change to something else. (Webster's Dict.; Century Dict.) Under somewhat similar language it has been held that trustees might properly change the form of the investment from railroad bonds to real estate. (*Whittingham v. Schofield's Trustee*, 67 S. W. Rep. 846.) The record discloses that the estate at the time of testator's death was about equally divided between real and personal property, and the will directs "that where real and personal property

have been given in trust, a proper proportion be maintained between them. It has been my general intention to keep at least half of my property in real estate and the rest in personal property, but in this particular my trustees are to use their own discretion and act in each case as may, under the circumstances, seem best to them." The ample powers of investment and re-investment contained in the provisions of the will just referred to are fully confirmed by the further provision which grants the trustees such powers over the estate "as may be necessary or convenient to carry into full effect my intentions and designs in the execution of this will." The trustees could not carry out the intention of the testator and keep a proper proportion between real and personal property during the life of the trust,—more than thirty years,—if they were obliged to invest the trust estate and its accumulations in personal property, only. Neither could the trustees carry out the intention and design of the testator as expressed in the will that they should exercise "their own discretion and act in each case as may, under the circumstances, seem best to them," without having the full authority of investment as found by the decree and affirmed by the judgment of the Appellate Court.

The creator of a trust may designate how the investments may be made and what security may be taken or that security may be dispensed with, and the trustees will be bound by the directions. (*Denike v. Harris*, 84 N. Y. 89; 1 Perry on Trusts,—6th ed.—sec. 452; 17 Am. & Eng. Ency. of Law,—2d ed.—428, and cases cited.) The questions, therefore, before us, depend "not on a rule of law but on the interpretation" of the will, so as to find the intention of the testator. (*In re Rush's Estate*, 12 Pa. St. 375.) The intention of the testator is always the primary object to be sought in deciding as to the authority given the trustees. *McCoy v. Horwitz*, 62 Md. 183.

Whether the trustees under this will can invest trust funds in real estate in Illinois depends upon the testator's

intention as gathered from the entire will, having in mind the duration of the trust, the amount of the estate and the ample powers conferred upon the trustees. In this case we are considering an instrument in which there are specific directions as to the management and investment of the trust estate. Such was not the situation in *Sholty v. Sholty*, 140 Ill. 81, *Butler v. Butler*, 164 id. 171, *White v. Sherman*, 168 id. 589, and *Penn v. Fogler*, 182 id. 76. In all of those cases, however, it is specifically stated or clearly implied that the trustees are authorized to invest trust funds in such manner as directed by the instrument creating the trust.

The following statute was enacted in Illinois in 1905: "That investments of trust funds by trustees, may, when not otherwise provided by the will, deed, decree, gift, grant or other instrument creating or fixing the respective trust, be in the bonds of the United States or of any of the States of the United States, or in first mortgages upon real estate in any State, or in the bonds of any county, city or municipality in any State, or in the first mortgage bonds of any corporation of any State upon which no default in payment of interest shall have occurred, for a period of five years, but no trustee shall be authorized by this act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money, and any trustee may continue to hold any investment received by him under the trust, or any increase thereof." (Hurd's Stat. 1909, p. 2252.) This act was in force at the time of the testator's death. Such statutes are generally permissive rather than mandatory. They are intended to provide for situations where the instrument constituting the trust does not otherwise provide. (*Willis v. Braucher*, 79 Ohio St. 290.) Other investments than those named in the statute may be authorized by a trust instrument. (*Clark v. Beers*, 61 Conn. 87; *Durrett's Guardian v. Commonwealth*, 90 Ky. 312.) Even though the constitution did not permit the

legislature to authorize the investment of trust funds in certain bonds or stocks, it was held that such investment might be authorized by the trust instrument. (*In re Barker's Estate*, 159 Pa. St. 518.) Where the will gives authority to the trustees to convert realty into personalty or personalty into realty, or invest and re-invest, in their discretion, the trustees may purchase such securities as a prudent and provident person would purchase as good and safe investments, and they are not restricted to the conditions and limitations imposed by law for the investment of trust funds. (*In re Allis' Estate*, 123 Wis. 223; see, also, to the same effect, *Drake v. Crane*, 127 Mo. 85, and *Brown v. French*, 125 Mass. 410.) The words in an instrument, "with full power to make purchases, investments and exchanges in such manner as to them shall seem expedient," have been construed to be enabling words giving trustees the power to deal "fully and expeditiously with the estate" but not releasing them from the obligation to exercise sound judgment and reasonable and prudent discretion. *In re Day's Estate*, 183 Mass. 499.

It is argued that the investment of the funds of an estate in real estate in other States will permit them to escape from the jurisdiction of our courts. The trustees named in this will are domiciled in this State, subject at all times to the courts of the State for any breach of their trust. The jurisdiction of our courts can therefore be invoked in disputes arising from investments outside of the State as well as from investments within the State. It is obvious from the statute referred to that it is not against the public policy of Illinois to authorize investments in securities outside of the State. If, without express authority in the trust instrument, a trustee may, under this statute, invest in real estate mortgages in other States, it can hardly be argued that the public policy of the State prohibits trustees from making investments in real estate in other States. A further argument in favor of the investment of the funds

in lands in other States can fairly be based on the fact that the testator, himself a man of undoubted business sagacity and foresight, invested his own funds in that manner, and such facts "might well be taken into consideration by the trustees when called to exercise their best skill and discretion. They might reasonably and properly inquire and consider what the testator would do if the testator were placed in the situation in which they were placed." (*Harvard College v. Amory*, 9 Pick. 446.) In the case just referred to, the court held that the trustees had authority to invest money in a dwelling house for a daughter, in North Carolina. In *Thayer v. Dewey*, 185 Mass. 68, it was held that the rule in that State as to the duty of trustees in making investments was that they should act in good faith in the exercise of sound discretion, and the court held that even though the trust instrument did not give the express authority, the trustees were justified in investing more than \$200,000 of the trust funds in real estate in Illinois. All parties conceded in that case that if the instrument so authorized, an investment could be made in real estate in another State.

It is contended that the cases of *McCullough v. McCullough*, 44 N. J. Eq. 313, and *In re Reed*, 45 App. Div. (N. Y.) 196, lay down a contrary rule. A later decision of the highest court of New York in effect announces the doctrine that, in the absence of statutory authority, uncontrolled powers of investment will not be held to limit investments to the State where the trust was created. (*In re Hall*, 164 N. Y. 196.) It may be conceded that the authorities are not all in harmony as to the investment of trust funds in States other than where the trustees reside, when not particularly authorized by the trust instrument. It seems clear, however, that the tendency of the decisions in recent years is to broaden the powers of trustees as to such investments. (*Willis v. Braucher*, *supra*; *In re Nyce's Estate*, 40 Am. Dec. 498, and note.) Recent legislation

and decisions in Great Britain are less restrictive as to the locality for trust investments than formerly. Power to invest in real securities in England or Wales has been held to authorize such an investment in Ireland. (17 Am. & Eng. Ency. of Law,—2d ed.—455, and cases cited.) Trustees have the power to invest in stocks or securities, not only of companies, incorporated or unincorporated, in the United Kingdom, but also of companies formed or registered outside. (*Tennant v. Stanley*, 75 L. J. 56; see, also, *Rayner v. Rayner*, 73 L. J. Ch. Div. 111; *Ovey v. Ovey*, 2 L. R. Ch. Div. 524.) That the testator intended the trustees to have the power to make investments in other States appears clear, not only from the broad powers given to them in the will as well as from the fact that he had made such investments himself, but also in that he expressly directs that if the provisions of the will relating to his investments in real property in other States conflict with the laws of such other States then such real estate should be sold. The conclusion is obvious that otherwise he intended such real estate to be retained as an investment, if the trustees so desired. The argument that the findings of the decree would extend the field of investments beyond the United States is not sound. The public policy of our State, as shown by the statute in question, only allows investments in States of the Union. It does not extend to investments in foreign countries.

It is further contended that the decree of the circuit court is wrong in authorizing the trustees to acquire and pay for their *pro rata* share of any increase of capital stock offered to them by the corporation at less than market value, by reason of their ownership of shares of stock which belonged to Marshall Field at his death or which came to them by reason of their ownership of stock belonging to Marshall Field at his death. We think the findings of the decree in this regard are clearly within the authority granted by the will. Moreover, the statute referred to pro-

vides that "any trustee may continue to hold any investment received by him under the trust, or any increase thereof." This plainly includes, under the words "any increase thereof," such an investment as is above referred to.

In the management and investment of trust property the will provides that the trustees shall have regard for the certainty of the income rather than the amount, and this is the general rule. The law does not give trustees the same freedom of choice in investments that may be exercised by prudent business men in their own affairs. It permits the trustee to assume no risks in his investment other than those that are inseparable from every species of property. "Absolute freedom from risk is impossible. The most stable forms of property may lose their value; lands may depreciate; even nations may become bankrupt. From these reasons which inhere in every kind of ownership the law does not pretend to save the beneficiary, but from the risk growing out of the uncertainty of speculative investments the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner," unless upon the express direction in the instrument creating the trust or statutory permission. (3 Pomeroy's Eq. Jur.—3d ed.—sec. 1074.) The trustees must always and ever, in exercising their powers, act in the utmost good faith and with sound judgment and prudence.

It is apparent from the entire will that the testator had great confidence in the ability and integrity of the trustees selected by him to manage his estate. He invested them with broad discretionary powers. They were charged with the investment of large funds. Their task is a great and responsible one. It was clearly the intention of the testator to permit them to invest the funds in accordance with the findings of the decree.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MARTIN SHEA, Appellant, vs. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Appellee.

Opinion filed April 19, 1911.

1. RAILROADS—*party owning farm land on both sides of railroad is entitled to a farm crossing.* A person owning farm land on both sides of a railroad is entitled to a farm crossing, under the act relating to the fencing and operation of railroads, regardless of whether he purchased the land on one side after the railroad was constructed or what his motive was in buying the land.

2. SAME—*whether land is farm land and is used in connection with other land are questions of fact.* Whether a small tract of land on one side of a railroad is farm land used in connection with the owner's farm on the other side, or whether it is an independent tract used separately from the other land, are questions of fact.

3. SAME—*the rule where two parallel adjoining railroads pass through farm.* Where two railroads parallel with and adjoining each other pass through a farm the farm adjoins each railroad though each part of the farm may not touch them both, and the owner of the farm is an adjoining land owner as to each railroad and is entitled to the benefit of statute relating to farm crossings.

4. SAME—*what does not excuse railroad company from putting in farm crossing.* The fact that one of the two parallel adjoining railroads running through a farm is an electric railroad does not authorize the steam railroad to object to putting in a farm crossing upon the ground that the owner of the farm may not be able to compel the electric road to put in such crossing.

5. SAME—*notice to railroad to put in farm crossing need not specify its precise location.* The notice to a railroad company to put in a farm crossing should describe lands on which the crossing is to be built, but it is not necessary to state the precise place where the crossing shall be located, as neither the owner nor the company has an absolute right to determine such location irrespective of the interests of the other and the safety of the public.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Coles county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding.

JAMES W. & EDWARD C. CRAIG, for appellant.

GEORGE B. GILLESPIE, (L. J. HACKNEY, GILLESPIE & FITZGERALD, and JAMES VAUSE, JR., of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The appellant, Martin Shea, sued the appellee before a justice of the peace of Coles county. Upon an appeal to the circuit court he recovered a judgment for \$67.40, which the Appellate Court reversed without remanding the cause. A certificate of importance having been granted, an appeal was taken to this court.

The appellant sued under section 4 of the "act in relation to fencing and operating railroads," (Hurd's Stat. 1909, p. 1750,) to recover double the value of a farm crossing which he had built.

The appellant since 1862 has owned, resided upon and farmed sixty acres of land a short distance east of the city of Mattoon, adjoining the railroad of the appellee, which formed the south boundary of the appellant's land. In 1903 the Mattoon City Railway Company built an electric railroad from Mattoon to Charleston, the right of way for which, opposite the appellant's farm and for some distance east and west, was south of, adjoining and parallel to the appellee's right of way. An east and west road ran past the appellant's farm, but there was no north and south road from about a mile and a half east to about a mile west of it. The electric road, which carried both passengers and freight, established a station immediately south of the appellant's farm, and he desired a crossing over the railroad to give him access to the electric cars. In March, 1909, he purchased an acre of land immediately south of and adjoining the right of way of the electric road, being a strip four rods wide, extending east and west forty rods, and soon after he gave notice to the appellee and the Mattoon City Railway Company to construct a farm crossing be-

tween the two tracts of land, and another notice to the appellee to construct a farm crossing to give access to the electric road from the appellant's land on the north of the railroad. The appellee not having constructed the crossing, the appellant did so and then brought this suit.

The appellant contends that the statute requires a railroad company to construct a farm crossing when necessary to enable an owner of land adjoining its right of way on one side to reach an electric road adjoining its right of way on the other side. He also contends that where an owner of land adjoining a railroad on one side buys land adjoining the railroad on the other side, his right to a farm crossing will not be affected by his motive in buying the land. The appellee disputes these propositions, and in the view we take of the case it will be necessary to consider only the latter.

The facts are undisputed. It may be conceded that appellant bought the acre of land south of the railroad for the purpose of getting a crossing and that he wanted the crossing to enable him to reach the electric road. Still, after he had bought the acre tract he was the owner of a farm divided by a railroad. If it be said that the acre was not a part of the farm but an independent tract, used separately and rented to a stranger, the answer is that the railroad alone makes it a separate tract, and that a crossing over the railroad is necessary to enable the owner to use his property as a connected farm, as he has a right to use it. This was, however, a question of fact which the judgment of the trial court settled in the appellant's favor. There is no evidence tending to show that the land was other than ordinary farm land, or was used or capable of use, as located and surrounded, for any other purpose. If the appellant had inherited or bought one hundred and sixty acres south of the railroad, surrounded on the east, south and west by land of other owners and with no electric road intervening, probably no question would be made

of his right to a farm crossing. So if the quantity had been forty acres, or twenty, or perhaps ten. It could not be said that the right to the crossing would not exist in any case where the land was of substantial value and capable of profitable cultivation and use. What has the appellant's motive in the acquisition of the land to do with his rights as a land owner after he has acquired it? The statute fixes the rights of the railroad company and adjoining land owners. Farm crossings must be constructed by railroad companies when and where they become necessary for the use of the proprietors of land adjoining the railroads. The right to buy land and the rights attached to its ownership are not limited by this provision. Such rights do not become fixed and unalterable by reason of the existence of a railroad adjoining a farm. Any person may buy any land he chooses, in any situation and for any reason that may appeal to him, and his rights as a land owner will be absolutely unaffected by the motives which induced him to buy. In this case the appellant owns the land mentioned in the evidence and is entitled to all the legal rights attaching to such ownership, unaffected, in the slightest degree, by the motives which induced him to buy the land. The Appellate Court, having made no finding of facts, must have found the facts the same as the trial court. Whether a farm crossing had become necessary, and whether the acre south of the railroad was capable of use in connection with the farm and as a part of it, or was intended to be so used, were questions of fact, or, at least, questions of mixed law and fact, which the trial court found in favor of appellant.

It is insisted by the appellee that the appellant's land south of the electric road does not adjoin the railroad. Where two railroads parallel with and adjoining one another pass through a farm, the farm adjoins each railroad though each part of the farm may not touch both railroads. The owner of the farm is an adjoining land owner as to each railroad and is entitled to the benefit of the statute.

It is also insisted that the appellant is not entitled to the crossing over the appellee's railroad because such crossing will not connect the north and south tracts, and the appellant cannot compel the construction of a crossing over the electric road because the Mattoon City Railway Company is incorporated under the general Incorporation act and is not subject to the act in question here. Under the evidence in this case the Mattoon City Railway Company seems to be operating a commercial railroad upon its own right of way. The Railroad and Warehouse act is the only authority under which such a railroad can be so operated in this State. (*Harvey v. Aurora and Geneva Railway Co.* 174 Ill. 295; *Dewey v. Chicago and Milwaukee Electric Railway Co.* 184 id 426.) It may be doubted whether a corporation exercising the privileges and franchises granted by that act could repudiate the liabilities imposed by statute upon corporations organized under it. But whether it may do so or not, a stranger cannot repudiate them in advance in a proceeding to which such railway company is not a party. If the right exists against the appellee it is sufficient for this suit.

It is also contended in behalf of appellee that the notice given by appellant was not sufficient in not stating where the farm crossing had become necessary. The statute only provides that the notice should describe the lands on which the farm crossing was required to be built. The notice did this. The precise location was a matter which neither party had the absolute right to determine without regard to the other. The interest of each and the safety of the public were to be considered. If the appellant did not select the precise spot, the appellee would be justified in using a reasonable discretion in choosing one, and *vice versa*.

The claim that the appellant is entitled to a crossing over the appellee's right of way by reason of the location of the station of the electric road we have not found it necessary to consider. The circuit court held that the ap-

pellant was so entitled and the Appellate Court held this to be error. Whether it was so or not, it was not sufficient to reverse the judgment, because it did not affect the validity of the appellant's other claim by reason of his ownership of farm lands which were divided by the railroad.

The judgment of the Appellate Court will be reversed and that of the circuit court affirmed.

Judgment reversed.

ALICE HEINROTH, Appellant, *vs.* ALBERT C. FROST *et al.*
Appellees.

Opinion filed April 19, 1911.

1. MORTGAGES—*sale under foreclosure decree is a sale of all the interest of every party.* A sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party, and all interests are merged in the certificate of purchase.

2. SAME—*right of creditor to redeem does not depend upon any lien.* The right of a judgment creditor to redeem from a foreclosure sale does not depend upon any lien on the property but exists solely by reason of section 20 of the act concerning judgments, decrees and executions.

3. SAME—*creditor's judgment may be in any county or court in the State.* The only requirement of section 20 of the act concerning judgments, decrees and executions, which gives a creditor the right to redeem from a foreclosure sale, is that the creditor shall have a judgment upon which an execution is authorized to issue, and it may be in any county or any court in the State.

4. SAME—*party may have right to redeem both as a party interested and as a judgment creditor.* A party may have a right to redeem from a foreclosure sale both as a person interested in the premises under section 18, and as a judgment creditor under section 20, of the act concerning judgments, decrees and executions.

5. SAME—*party to foreclosure suit may redeem as a judgment creditor.* The fact that a person is a party to a decree foreclosing a mortgage does not prevent such person from redeeming from the foreclosure sale after twelve months and within fifteen months from the sale, provided he obtains a decree or judgment so as to bring himself within the terms of the statute.

6. EJECTMENT—*when the parties claiming under junior encumbrance cannot maintain ejectment.* If the foreclosure of a first mortgage, the sale, redemption and subsequent conveyances are in conformity with the law, the title of the mortgagor and all other parties to the suit becomes vested in the grantees, and ejectment cannot be maintained against them by persons claiming through a junior mortgage.

7. JUDGMENTS AND DECREES—*finality of a foreclosure decree where unknown owner is notified by publication.* Where a person is made a party to a foreclosure proceeding by publication as an unknown owner, the decree is for three years subject to the right of such person, under section 19 of the Chancery act, to appear and answer the bill, but, subject only to that right, the decree is final, and enforceable the same as if had on personal service.

WRIT OF ERROR to the Circuit Court of Lake county;
the Hon. CHARLES H. DONNELLY, Judge, presiding.

LESLIE A. NEEDHAM, (GEO. W. FIELD, of counsel,)
for appellant.

HOLLAND & ELLIOTT, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

Alice Heinroth brought an action of ejectment against appellees and has appealed from a judgment in their favor.

The Winthrop Harbor and Dock Company is the common source of title. On December 8, 1899, it mortgaged the premises in controversy, together with another tract containing about one and three-fourths acres, to secure its note for \$10,000. The mortgage was foreclosed at the March term, 1902, of the circuit court of Lake county, and on May 13, 1902, the mortgaged premises were sold by the master under the decree to William Jones, the complainant. On August 13, 1903, Caroline Roth redeemed from that sale as a judgment creditor of the Winthrop Harbor and Dock Company. Another redemption by another judgment creditor followed, and litigation ensued between Mrs. Roth and the other judgment creditors of the Winthrop

Harbor and Dock Company, which resulted in a decree setting aside the sale under Mrs. Roth's execution, ordering a sale of the premises by the master and providing for the distribution of the proceeds. That litigation came to this court, where the decree was affirmed. (*Burnham v. Roth*, 244 Ill. 344.) A sale of the premises was afterward made by the master under that decree, and the appellees derive their title from that sale.

On January 31, 1901, the Winthrop Harbor and Dock Company conveyed to William T. Underwood the premises in controversy, together with a large amount of other real estate, in trust to secure a number of notes, and this trust deed was foreclosed at the March term, 1903, of the circuit court of Lake county. On May 19, 1903, the master sold, under this decree, to Caroline Roth all the real estate conveyed by the trust deed, including the premises which had been sold under the former decree, a year before, to William Jones. On June 25, 1904, Frank H. T. Potter, as assignee of a judgment against the Winthrop Harbor and Dock Company, redeemed from the master's sale of the premises in controversy and other premises, and subsequently, by virtue of a sale pursuant to said redemption, received from the sheriff a deed for all the premises so redeemed. It is under this deed that the plaintiff derives her title.

On November 26, 1900, the Winthrop Harbor and Dock Company executed a trust deed conveying to the Security Title and Trust Company, as trustee, the same property included in the mortgage of December 8, 1899, to secure the payment of twenty-nine notes of the Winthrop Harbor and Dock Company, twenty-eight being for \$600 each and one for \$700. These notes became the property of Caroline Roth, who redeemed from the sale under the first mortgage and also became the purchaser at the sale under the subsequent trust deed to Underwood. The trustee, the Security Title and Trust Company, was made a party to the

suit for the foreclosure of the first mortgage, as were also the unknown owners of the notes secured by the trust deed, who were notified by publication. Mrs. Roth was not made a party by name and did not appear. The decree was by default against all the defendants, finding the amount due the complainant, only, and that it was a first lien. The sale was to the complainant for his debt, interest and costs.

The twenty-nine notes secured by the trust deed to the Security Title and Trust Company were also included among the notes secured by the Underwood trust deed, though their lien, except as to the property included in the former trust deed, was inferior to other notes secured by the latter. The unknown holder of these twenty-nine notes, who was Caroline Roth, was made a party to the suit for the foreclosure of the Underwood trust deed. Mrs. Roth answered the bill, simply stating that she was the holder of the twenty-nine notes secured by the Underwood trust deed. The decree found that these notes were a second lien, and ordered that if the amount due on complainant's first lien was not paid the lands should be sold, and if there should be a surplus after satisfying the first lien it should be applied upon the second lien up to \$18,951.16. All the property included in the first mortgage and in the trust deed to the Security Title and Trust Company had been sold at the master's sale under the first decree of foreclosure before the suit to foreclose the Underwood trust deed was begun, and no mention was made of either the mortgage or trust deed or of the decree or sale, in the bill, answer or elsewhere, in the later suit. During the pendency of this suit, on March 30, 1903, Mrs. Roth recovered a judgment in the circuit court of Cook county on a part of her twenty-nine notes, a transcript of which was later filed in Lake county, and it was under this judgment, upon which a balance yet remained unpaid after the sale under the Underwood decree, that the redemption was made from the Jones sale.

On behalf of the appellant it is insisted that Mrs. Foley, the complainant in the suit to foreclose the Underwood trust deed, was not a party to the Jones suit to foreclose the first mortgage and was therefore not bound by the decree in that case; but it is manifest that the Jones mortgage being prior to the Underwood trust deed, if its foreclosure and the sale, redemption and subsequent conveyances were in conformity to law, the title of the Winthrop Harbor and Dock Company and all other parties to that suit has become vested in the appellees, and that the appellant, claiming through a junior encumbrance, cannot maintain ejectment against the appellees, who claim under the foreclosure of the prior encumbrance. Therefore, if the proceedings under which the appellees claim are found to be in conformity to law, it will be unnecessary to investigate the appellant's claim of title.

The question of the validity of the appellees' title turns upon Mrs. Roth's right to redeem from the sale to Jones on May 13, 1902. No objection is made to the sufficiency of the decree or the formality of any of the proceedings, but it is insisted that Mrs. Roth was not a creditor having a right, under the statute, to redeem. The proposition is advanced that a sale under a decree of foreclosure in default of payment of the amount due upon a prior mortgage lien directing the payment of the surplus arising from the sale upon a subsequent lien, not only extinguishes the subsequent lien but forever discharges the land from the payment of the debt, even though no decree of sale for the satisfaction of the subsequent lien has been made. The sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party. All are merged in the certificate of purchase. (*Ogle v. Koerner*, 140 Ill. 170; *Lightcap v. Bradley*, 186 id. 510.) Subsequent judgments do not become a lien on the property. The right of a creditor to redeem does not depend upon

any lien on the property, but exists solely by reason of section 20 of chapter 77 of the Revised Statutes of 1874. (*Commerce Vault Co. v. Barrett*, 222 Ill. 169.) The only requirement of that section is that the creditor shall have a judgment upon which an execution is authorized to issue, and it may be in any county or any court in the State. Any such judgment creditor may redeem by following the course directed by the statute. Upon this statutory right appellant would impose two limitations not found in the statute, viz., that a party, though a judgment creditor, may not redeem from his own sale, and that a party may not have the right to redeem both as a defendant or person interested in the premises under section 18 of chapter 77 and as a judgment creditor under section 20. In connection with the latter proposition it is insisted that as Mrs. Roth was a party to the Jones foreclosure suit only as the unknown owner of the notes secured by the trust deed to the Security Title and Trust Company and was notified by publication, only, the decree as to her was interlocutory and did not become final until three years from its date. It is true that Mrs. Roth might, under section 19 of the Chancery act, within three years have appeared, answered the bill and made defense if she had desired to do so, and that all rights acquired under the decree would have been subject to the further action of the court. But subject to such action as might be had upon her application the decree was conclusive. It might be enforced and all rights acquired under or with reference to it would be valid to the same extent as if it had been rendered on personal service. Mrs. Roth did not appear and answer the bill, and the decree has at all times since its rendition had the same force and the rights of all persons in relation to it have been the same as if it had been rendered on personal service.

The contention that a party may not have the right to redeem both as a person interested in the premises under section 18 and as a judgment creditor under section 20 has

been decided adversely to the appellant in *Whitehead v. Hall*, 148 Ill. 253, and *Beadle v. Cole*, 173 id. 136. In each of those cases a second mortgagee was made a party to a bill to foreclose the first mortgage, and at the sale the first mortgagee became the purchaser for the amount of the decree, interest and costs. It was held that the second mortgagee had a right to redeem within twelve months after the sale under section 18, and having obtained a decree of foreclosure of his mortgage was also entitled to redeem as a decree creditor under section 20 after twelve months and within fifteen months of the sale.

Whether a party may redeem from his own sale or not is a question which is not presented by this record. Neither of the foreclosure sales here was Mrs. Roth's. They were not brought about by her. In the Jones decree she did not even answer, but the decree was by default. In the Underwood decree she answered, merely setting up her ownership of certain notes mentioned in the bill but asking no relief. In neither case was her statutory right of redemption affected by the decree. Under the two cases last cited she had a right to redeem from either sale within twelve months. Under them, also, if she obtained a decree or judgment so as to bring herself within the terms of the statute as a decree or judgment creditor, she would have a right to redeem after twelve months and within fifteen months of the sale. We have many times recognized the right of a judgment creditor to redeem after twelve and within fifteen months from a sale made under a decree to enforce a prior lien to which such judgment creditor was a party. (*Boynton v. Pierce*, 151 Ill. 197; *People v. Bowman*, 181 id. 421; *Wehrheim v. Smith*, 226 id. 346; *Wood v. Whelen*, 93 id. 153.) Whether Mrs. Roth, at the sale under the second foreclosure decree on May 19, 1903, acquired anything or not,—whether, as the successor to an interest which had not been represented in the previous foreclosure, she had any right to redeem or not,—under

the plain language of the statute and the decisions of this court which have been mentioned she had the right, as a judgment creditor, to redeem from the sale of May 13, 1902. No irregularity having been complained of in the proceedings prior or subsequent to the redemption, the title passed by those proceedings to the appellees and must prevail against a title founded on the later mortgage.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. EDWARD B. PRICE, Plaintiff in Error.

Opinion filed April 19, 1911.

1. CRIMINAL LAW—*bigamous marriage and subsequent cohabitation are distinct offenses.* The offenses of a bigamous marriage and subsequent cohabitation are so far distinct that an indictment charging the bigamous marriage may be presented in the county where such marriage took place and an indictment charging the unlawful cohabitation be presented where cohabitation took place.

2. SAME—*a prosecution for unlawful cohabitation must be carried on where cohabitation took place.* While it was within the power of the legislature to provide, in section 28 of the Criminal Code, that cohabitation under a bigamous marriage shall be punishable as bigamy, yet the prosecution for such offense must be begun and carried on where the cohabitation took place.

3. SAME—*averment that lawful wife was alive when cohabitation with bigamous wife occurred is essential.* Where a prosecution for bigamy is based upon the continued cohabitation under a bigamous marriage, it is essential that the indictment allege that the lawful wife was alive when such cohabitation took place, and an averment that she was alive when the bigamous marriage in another county took place is not sufficient. (*Tucker v. People*, 117 Ill. 88, disapproved.)

4. SAME—*no presumption can be indulged to aid defective indictment.* Failure of an indictment to aver that the defendant's lawful wife was living when the cohabitation between the defendant and his bigamous wife occurred cannot be aided by any presumption as to the continuance of life of the lawful wife, who was averred to have been alive when the bigamous marriage took place in another county.

HAND, CARTWRIGHT and CARTER, JJ., dissenting.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. KICKHAM SCANLAN, Judge, presiding.

B. M. THOMAS, for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and W. EDGAR SAMPSON, (ZACH HOFHEIMER, of counsel,) for the People.

Mr. CHIEF JUSTICE VICKERS delivered the opinion of the court:

Edward B. Price was convicted in the criminal court of Cook county under an indictment charging him with the offense of bigamy and sentenced to an indeterminate term in the penitentiary. He has sued out of this court a writ of error for the purpose of bringing the record of his conviction before this court for review.

Numerous errors are assigned upon the record and argued in the briefs of counsel, but in the view that we have of this case it will only be necessary to consider the error assigned upon the overruling of plaintiff in error's motion to quash the indictment.

The indictment, omitting the formal parts, is as follows: "That one Edward B. Price, late of the county of Cook, on the third day of July, in the year of our Lord one thousand nine hundred and four, at the city of St. Joseph, in the State of Michigan, did lawfully marry one Ida M. Lambur and then and there did have the said Ida for his wife, and that he, the said Edward B. Price, afterwards, and while he was so married to the said Ida, as aforesaid, to-wit, on the first day of May, in the year of our Lord one thousand nine hundred and nine, in Kane county, in the State of Illinois, feloniously and unlawfully did marry and take to wife one Cora L. Suck, otherwise called Cora Zuck, and to her, the said Cora, was then and there last aforesaid

married, the said Ida, the said former wife, being then alive, and the said Edward B. Price, at the time of his said marriage to the said Cora, well knowing that the said Ida, his former wife, was then alive, and afterwards, to-wit, on the ninth day of May, in the year of our Lord one thousand nine hundred and nine, he, the said Edward B. Price, unlawfully and feloniously with the said Cora did live and cohabit and continue to cohabit with the said Cora, his second wife, as aforesaid, in the said county of Cook and State of Illinois aforesaid, contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

The objection pointed out to this indictment is, that it nowhere charges that the wife, Ida, was alive at the time the offense of unlawful cohabitation is alleged to have been committed in Cook county.

Sections 28 and 29 of our Criminal Code, relating to the offense of bigamy, are as follows:

"Sec. 28. Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State, shall be deemed guilty of bigamy, and be imprisoned in the penitentiary not less than one nor more five years, and fined not exceeding \$1000: *Provided*, nothing herein contained shall extend to any person whose husband or wife shall have been continually absent from such person for the space of five years together, prior to said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that, or shall be at the time of such second marriage, divorced by lawful authority from the bands of such former marriage, or to any person where the former marriage hath been, by lawful authority, declared void.

"Sec. 29. It shall not be necessary to prove either of the marriages by the register or certificate thereof, or other

record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases. The offense may be alleged to have been committed, and the trial may take place in the county where cohabitation shall have occurred."

It will be observed that the offense of bigamy may be committed by marrying another person while the former husband or wife is living, or by continuing cohabitation with such second husband or wife in this State while such former husband or wife is still alive. The offense of which plaintiff in error was convicted was unlawful cohabitation in Cook county in pursuance of a bigamous marriage contracted in Kane county, Illinois. The situation presented is as follows: Plaintiff in error contracted his first and lawful marriage in St. Joseph, Michigan, on the third day of July, 1904. He contracted his second and bigamous marriage in Kane county, Illinois, on May 1, 1909. He unlawfully cohabited with his second wife in Cook county, Illinois, on May 9, 1909.

It is contended on behalf of the State that the offense for which plaintiff in error was indicted and convicted was the bigamous marriage in Kane county, as to which the indictment charges that the wife, Ida, was then alive, and that the true construction of our statute which makes continued cohabitation an offense is merely intended to give the court where such cohabitation occurs, jurisdiction of the offense of bigamy that was committed when the marriage was contracted in a county or State other than that in which the prosecution occurs. The construction contended for, in our opinion, if allowed to prevail, would render the statute open to a constitutional objection. Clearly, the legislature would have no power to make an act committed in a foreign State or country a felony in this State simply because the offender might be found and apprehended here. There is no doubt of the power of the legis-

lature, for the protection of good morals and the punishment of indecency, to make the cohabitation of a man and woman begun under a bigamous marriage in another State or country a felony in this State, and a prosecution for that offense must be begun and carried on in the county where the unlawful cohabitation occurs. *State v. Stewart*, 194 Mo. 345; 112 Am. St. Rep. 529.

In the case above cited the Supreme Court of Missouri had under consideration a case where the party charged had contracted a bigamous marriage in Alexander county, Illinois, and subsequently removed to St. Louis and there continued to cohabit with his bigamous wife while his first and lawful wife was still living. The statute of Missouri, like that of Illinois, made continued cohabitation in Missouri, founded on a bigamous marriage, bigamy. It was there contended that the legislature had no power to make cohabitation in Missouri a distinct felony. That contention was overruled, and the Supreme Court, in an exhaustive and well considered opinion, held that the legislature had the power to make the mere continuation of cohabitation a distinct felony, and the fact that the legislature had seen proper to call the offense thereby created bigamy was no objection to the validity of the statute. The same court, in *State v. Smiley*, 98 Mo. 605, held a statute unconstitutional which provided that "an indictment for bigamy * * * might be found and proceedings, trial, conviction, judgment and execution thereon had in the county in which such second or subsequent marriage or cohabitation shall have taken place or in the county in which the offender may be apprehended." That portion of the statute which purported to confer jurisdiction on the court in any county in which the offender was apprehended was held invalid under the constitution of Missouri. The ground upon which this decision rests is, that the constitution of Missouri requires that an indictment for felony must be found by the

grand jury of the county where the offense was committed. A similar statute was held unconstitutional in the Supreme Court of Arkansas in *Wall v. State*, 32 Ark. 565.

The English statute on the subject of bigamy permits the prosecution for a bigamous marriage to be carried on "in the county where the offender shall be apprehended or be in custody," but Mr. Bishop, in his work on Statutory Crimes, observes that he has not found much of this sort of legislation in America, and adds that in "some of the States it would be constitutionally objectionable, particularly as respects the place of trial."

Section 9 of the bill of rights provides that in criminal prosecutions the accused shall have the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Unless the continuation of cohabitation in pursuance of a bigamous marriage is regarded as an offense committed in the county where such cohabitation occurs we are unable to see how the statute can be held constitutional. In the case at bar the bigamous marriage was contracted in Kane county. The offense of bigamy was complete in Kane county when the marriage was contracted. If plaintiff in error were indicted in that county it would not be necessary to allege or prove cohabitation, but the offense committed in Cook county was cohabitation in pursuance of the unlawful marriage in Kane county. The two offenses are so far distinct and separable that an indictment might have been presented in Kane county for the unlawful and bigamous marriage and in Cook county for the unlawful cohabitation in pursuance thereof.

The only further inquiry is, was it essential to allege that at the time of the unlawful cohabitation in Cook county the former wife was then alive? Regarding the unlawful cohabitation as a distinct offense committed in Cook county on the 9th of May, 1909, it was a necessary element of

that offense that the former spouse of plaintiff in error was then alive. In the case of *Prichard v. People*, 149 Ill. 50, this court held that the indictment for bigamy, which failed to charge that at the time of the alleged bigamous marriage the former wife was then alive, was not sufficient. The statute then read, as it does now, that "whoever, having a former husband or wife living, marries another person or continues to cohabit with such second husband or wife in this State, * * * shall be deemed guilty of bigamy." The phrase, "having a former husband or wife living," in our statute, cannot be limited in its application to the first offense of marrying another person, but applies also to the other offense created by the words "continues to cohabit with such second husband or wife in this State." In the case above cited, this court, on page 54 of the opinion, said: "It is, of course, indispensable to the commission of the crime of bigamy that the first husband or wife should be living at the time of the second marriage. Indeed, the crime, by its very definition, consists of marrying a second husband or wife while the first husband or wife is living and undivorced."

The case of *Tucker v. People*, 117 Ill. 88, is relied on by the State as an authority in support of the sufficiency of the indictment under consideration. In that case the indictment charged that the defendant, on the 15th day of April, 1872, in Cook county, Illinois, married one Mary I. Bennett, who then became his lawful wife; that afterwards, on the 19th of September, 1883, at St. Paul, in the county of Ramsey, in the State of Minnesota, he unlawfully married Mary E. Markham while the defendant was yet the lawful husband of the said Mary I. Bennett, never having been divorced from her and she being then living, and afterwards the defendant did unlawfully cohabit with the said Mary E. Markham in the county of Kankakee, in this State. The sufficiency of the indictment in that case does not appear to

have been challenged either by a motion to quash or otherwise. After setting out the substance of the indictment as above, the court makes this statement: "The charge makes the offense under our statute."

The indictment in the *Tucker case* had the precise defect in it that exists in the one now under consideration, but inasmuch as the sufficiency of the indictment was not in question in that case, the remark above quoted must be held as mere *obiter*. So far as we have been able to find, no case has been decided by this court involving the precise point that is here involved. While the *Tucker* indictment was similar to the one at bar, that case is not an authority. We think, on principle, that the indictment must be held fatally defective for want of an averment that plaintiff in error's former wife was living at the time of the unlawful cohabitation in Cook county. This question is not to be confounded with the question of proof or presumptions. If the averment were in the indictment, proof that his former wife was alive at some time prior to the date in question might afford a basis for a presumption of fact that she was alive at the date in question; but the question here is not one of proof but of pleading, and no presumption can be indulged in support of a defective statement in an indictment.

For the error in overruling the motion to quash the indictment the judgment of the criminal court of Cook county is reversed.

Judgment reversed.

HAND, CARTWRIGHT and CARTER, JJ., dissenting:

The case of *Tucker v. People*, 117 Ill. 88, has been recognized and acted upon as the law of this State for twenty-five years, and we do not think that it should now be overruled, as is done by the majority opinion.

AUGUST BECKER *et al.* Appellants, *vs.* WALTER BECKER
et al.—(JESSE MISHLER, Appellee.)

Opinion filed April 19, 1911.

1. EVIDENCE—*parol evidence showing waiver of provision of a written contract does not vary the contract.* An executory contract under seal cannot be modified by parol evidence so as to introduce any new element into the contract or add any new terms thereto, but parol evidence showing a waiver of some provision does not alter or modify the contract.

2. SAME—*waiver of covenant in sealed contract may be shown by parol.* A party for whose benefit a covenant is inserted in a written instrument may waive such covenant by parol agreement notwithstanding the instrument is under seal, and such waiver may be proved by oral testimony in a suit by the other party to enforce his rights under the written instrument.

3. ANTE-NUPTIAL CONTRACTS—*when heirs are estopped to say that contract should not be enforced.* Where an ante-nuptial contract provides that the husband shall have the wife's property absolutely if she predeceases him, and he covenants, among other things, to keep up a certain life insurance policy or its equivalent during the wife's lifetime, the heirs of the wife are estopped, after her death, to insist upon a forfeiture of the contract because the covenant as to the insurance had not been kept by the husband, where the evidence clearly shows that the wife waived the performance of the covenant by insisting that the husband should not carry any insurance.

APPEAL from the Circuit Court of Whiteside county;
the Hon. FRANK D. RAMSAY, Judge, presiding.

SKINNER & COE, CHARLES A. BIERNATSKI, and JARVIS
DINSMOOR, for appellants.

A. A. WOLFERSPERGER, MCMAHON & ROGERS, and
MCCALMONT & RAMSAY, for appellee.

Mr. CHIEF JUSTICE VICKERS delivered the opinion of
the court:

Appellants, as the heirs-at-law of Augusta Mishler, deceased, filed a bill in the circuit court of Whiteside county to partition certain lands situated in said county which it

was alleged belonged to said Augusta Mishler at the time of her death. Jesse Mishler, the surviving husband of Augusta Mishler, was made a party defendant to the bill and interposed a demurrer thereto, which was sustained and a decree was entered dismissing the bill for want of equity, and appellants appealed from said decree to this court. At the October term, 1909, this court entered a judgment reversing the decree of the circuit court and remanding said cause, with directions to the circuit court to overrule the demurrer. The former opinion of this court is reported as *Becker v. Becker*, 241 Ill. 423. After the cause was remanded to the circuit court defendant below, Jesse Mishler, answered the bill and filed a cross-bill. A trial was had upon the issues made below upon evidence heard in open court, resulting in a decree dismissing the original bill and granting the relief prayed for in the cross-bill. Complainants below have again brought the record to this court for review.

This litigation grows out of an ante-nuptial contract which was entered into on the 16th day of March, 1889, between Augusta Scheer and Jesse Mishler, both of Whiteside county. The agreement is set out at large in the former opinion of this court. This agreement recites that whereas marriage is about to be solemnized between the parties, and whereas the said parties each own both real and personal property in their own right and it is desired that each party shall remain in the possession, control and enjoyment of all of the property owned by each, precisely as though no marriage had taken place, during the joint lives of the contracting parties, they mutually covenant that each of the parties shall own, control and enjoy all of the separate property of such party free and clear from any right or claim, of any kind or character, of said other party. The agreement provided that if at the death of Jesse Mishler the said Augusta Scheer should survive him, she shall be entitled to the money arising from a policy of insurance

of \$2000 on the life of Jesse Mishler in the Whiteman's Life Insurance Company, which said policy was at the time of the making of said agreement in full force and effect, and that said policy, or its equivalent in some reputable company, shall be kept in full force and effect during the life of said Jesse Mishler as part of the consideration of said contract. Said agreement recited further, in consideration of said such marriage and the further consideration of money, that Jesse Mishler would waive and release unto said Augusta Scheer all dower interest in the real estate possessed by her or which she might thereafter acquire, and likewise release all claim upon her personal property, and to allow her to receive, expend and re-invest all income, rents and profits therefrom, at her discretion, for her own separate use the same as though she was unmarried. Said agreement also provided that in consideration of the marriage and the covenants on the part of Jesse Mishler, Augusta Scheer relinquishes all right and claim, of every kind and character, in and to all of the property of the said Jesse Mishler or any property which he might thereafter acquire. The agreement further provided as follows: "And she [Augusta Scheer] hereby covenants and agrees, in consideration of said marriage and the aforesaid covenants and acquirements entered into on the part of Jesse Mishler, that the said Jesse Mishler shall at her, the said Augusta Scheer's, death, have as his own an absolute fee simple title in and to all the real estate of which she may die seized, and shall have, possess, control and own absolute all the personal estate, of every description, of which she may die possessed or which she may be entitled to, free from let or hindrance upon the part of the heirs of the said Augusta Scheer. The purpose and meaning hereof being, that in case Augusta Scheer shall survive the said Jesse Mishler she have her own separate estate and the money arising from the life insurance policy aforesaid, discharged of any right or interest, claim or demands, of

the heirs of the said Jesse Mishler, but in case she shall not survive the said Jesse Mishler, the latter shall at her death become immediately vested with all the absolute right, title and ownership in and to all the real and personal estate of which the said Augusta Scheer may die seized or possessed, to the exclusion of the heirs of the said Augusta Scheer."

The original bill alleged, and the proof showed, that the parties to this contract were married a short time after the date of the ante-nuptial agreement and lived together as husband and wife until the death of Augusta Mishler, which occurred in 1905. The original bill was filed by the children and grandchildren of a deceased brother of Augusta Mishler, who were her only heirs-at-law, and based their right to the real estate of which Augusta Mishler died seized upon the ground that the appellee, Jesse Mishler, did not keep the insurance policy mentioned in said contract in force and permitted the same to lapse many years before the death of his said wife, and never took out any other policy of insurance in lieu thereof in any other insurance company, and that in consequence of his failure to comply with said contract in respect to keeping up the insurance for his wife he had thereby forfeited all right, title and interest in and to the real estate of which his wife died seized.

When the case was before this court on the former hearing it was held that the original bill presented a state of facts which, if true, would deprive appellee of the right to claim the property which his wife owned at the time of her death, under the ante-nuptial contract. By his answer and cross-bill the appellee sets up a waiver by his wife, in her lifetime, of that provision of the ante-nuptial contract which required him to carry \$2000 of life insurance for his wife's benefit. Appellee alleges in his answer and in his cross-bill that the Whiteman's Life Insurance Company, in which said \$2000 was carried, was soon after said ante-nuptial contract, and after said marriage, merged in some

other company, and at that time, at the request of the said Augusta Mishler, said policy of insurance was dropped and discontinued; that appellee insisted upon taking out other insurance in the sum of \$2000 in some other reputable insurance company to conform with the ante-nuptial contract, but that his wife insisted that he should not do so and that she would waive the same in said contract, and that at her request and upon her insistence he did not take out other insurance as stipulated in said ante-nuptial contract.

On the hearing before the court a number of witnesses were introduced who testified to conversations had with Augusta Mishler, in her lifetime, in relation to the \$2000 life insurance policy upon the life of her husband. Calvin S. Mishler, a son of appellee, testified that he had a conversation with his step-mother in 1904, the year of the World's Fair at St. Louis. He testified that Mrs. Mishler said to him in the spring of that year that Mr. Mishler had carried life insurance, and that she thought it was like throwing money away to keep the life insurance going, and that she did not want him to carry the life insurance any longer. This witness testifies that this conversation occurred while he was visiting at his father's house and while he was digging up a small space in the garden for his step-mother. This witness says also that his step-mother offered to give him \$10, and he said that he refused it, and she told him that he might as well take it for he would get it anyway some day; that she had left all her property to his father, and said, "Sometime you will have a pretty nice lot of money;" that his step-mother said at that time that she did not want her husband to carry life insurance for her benefit; that she did not need the insurance and had plenty of money of her own to live on.

David Schafer testified that he was acquainted with appellee and his wife and had been for a number of years, and that he worked for them digging a cellar and doing other work; that in the year 1903 or 1904, after the cellar

was dug, he had some money coming from Mr. Mishler and went to his house to get the money; that when he arrived at the house Mr. Mishler was not at home and Mrs. Mishler asked him to take a seat and wait until Mr. Mishler came in; that while he was waiting for Mr. Mishler to come he had a conversation with Mrs. Mishler in German, and that in this conversation Mrs. Mishler asked him whether he owned his own place and whether he had insurance on his life, and that the witness said that he did own his place and that he had insurance for himself and wife; that Mrs. Mishler said, "You are foolish; don't get any insurance; save your money and don't have any insurance at all; that is all nonsense." She said that Mr. Mishler had insurance and that it "busted up."

Melvin S. Mishler testified that he was forty-one years of age and a son of appellee; that he was well acquainted with his step-mother, Augusta Mishler, before and after her marriage to his father. He testified to a conversation had at the home of his father with his step-mother, in which she said, among other things, that his father had been carrying insurance on his life and had paid in about \$13 and the company "busted," and that she did not want him to take out any more insurance.

John Eick testified that he had known Mrs. Mishler about all her life; that he knew her as far back as 1862; that he went to Mr. Mishler's home, in Sterling, in the year 1900, with his brother, who was a life insurance agent, for the purpose of soliciting insurance on the life of appellee; that his brother represented the Union Central of Cincinnati, Ohio; that a conversation occurred at that time in the Mishler home in which Mrs. Mishler said they did not want any insurance; that they had insurance in a company and the company had dissolved or gone out of business and that she did not want her husband to put another dollar in insurance; that no insurance was written for Mr. Mishler at that time.

Jennie Cushman testified that she had been acquainted with Augusta Mishler five years and knew her very intimately; that she lived in Mrs. Mishler's house for ten years and was often at her place, and that she visited Mrs. Mishler and took care of her several times during sickness; that she had a conversation with Mrs. Mishler, in the presence of her husband, in the year 1903, when Mrs. Mishler was sick; that at this conversation the death of a Mr. Waltz was spoken of, and Mrs. Mishler asked the witness if Mr. Waltz left any life insurance for his widow, and the witness said that she did not know; that Mrs. Mishler then asked the witness if her husband carried insurance, and Mrs. Cushman replied that he did. Mrs. Cushman then testifies that she asked if Mr. Mishler carried insurance for her, and Mrs. Mishler said that he had once but the insurance company failed and that she did not have him take any more insurance; that she did not believe in insurance and she never had him take out any more; that she did not want it and did not need it; that she had enough to live on without it. Mrs. Mishler also told this witness that one reason why she did not want Mr. Mishler to carry insurance for her was, that if he died suddenly people might think she killed him. Mrs. Mishler was seventy-three years old when she died.

There is nothing in the record that contradicts any of the foregoing testimony. Upon this evidence the trial court held that Mrs. Mishler had waived the provision in the ante-nuptial contract requiring appellee to carry \$2000 life insurance upon his life for her benefit and entered a decree for the specific performance of the contract, vesting the fee simple title of the real estate of which Mrs. Mishler died seized, in appellee. All of the foregoing evidence was received subject to the objection that it was not competent to vary or modify a written contract under seal by parol evidence.

Appellants' most serious contention in this court is that the decree should be reversed because it is based upon incompetent testimony. Appellants' position may be stated as follows: The ante-nuptial contract related to marriage, and was therefore required by the statute to be in writing. Since the original contract was an instrument in writing under seal, any new agreement altering or enlarging its terms must also be in writing in order to be valid. In support of this general proposition many authorities are cited, several of which are Illinois cases. If the rights of the parties depended upon the rule contended for by appellants no serious question could arise as to the correctness of the position assumed. There are many cases in this court that establish the rule, beyond controversy, that an executory contract under seal cannot be modified by parol, so as to introduce any new element into the contract or by which any new terms are added thereto. The rule contended for by appellants is thus announced by this court in *Alschuler v. Schiff*, 164 Ill. 298, where, on page 302, this court said: "There can no longer be any contention in this State over the general rule insisted upon by appellee, that a sealed executory contract cannot be altered, changed or modified by parol agreement. This rule of the common law has been adopted by this court and consistently followed in a long line of unbroken authorities,"—citing *Chapman v. McGrew*, 20 Ill. 101; *Hume Bros. v. Taylor*, 63 id. 43; *Barnett v. Barnes*, 73 id. 216; *Loach v. Farum*, 90 id. 368; *Goldsborough v. Gable*, 140 id. 269.

The rule announced in these cases, and others in line with them, is too firmly established by the decisions of this court to be seriously controverted at this time. Conceding the full force of the rule above announced, there is a well defined distinction between a parol contract which adds to or modifies the terms of an executory written contract under seal, and a parol agreement made by the parties by which some of the covenants in such written contract are

waived by the party for whose benefit such covenant was inserted. Where a party to such written instrument by some affirmative action on his part induces the opposite party to believe that the strict performance of a covenant will not be insisted upon or that the same will be waived, and such other party fails to perform the covenant through the influence or request of the covenantee, in equity such party will be estopped to insist that the written contract is no longer obligatory upon him because of the non-performance of such covenant. A waiver of a covenant by the party for whose benefit it is inserted into a written instrument may be made by parol, and such waiver is held not to be a modification or change in the terms of the original agreement.

The rule last above announced was recognized and applied by this court in *Worrell v. Forsyth*, 141 Ill. 22. In that case an ante-nuptial contract had been entered into by which the wife agreed that if she should survive her husband she was to have a certain described eighty acres of land and \$500 in money out of his estate in lieu of all other rights in and to his property. After the marriage the husband sold the eighty acres mentioned, and his wife joined in the deed therefor to the purchaser in consideration of the parol promise of the husband to give her another eighty acres of land of equal value, and at the same time the husband conveyed the latter tract to a trustee in trust for the husband during his life but to be conveyed to the wife if she survived him, and it was held competent for the husband and wife to enter into the parol contract for the substitution of another tract of land in place of that first given to the wife. On page 30 this court said: "An executed parol agreement may be shown to defeat a recovery upon an instrument under seal. If the new parol agreement, even though it be without consideration, has been executed, and by means thereof one of the parties thereto has been led into a line of conduct which must be prejudicial to his

interests, an equitable estoppel arises in his favor,"—citing *White v. Walker*, 31 Ill. 422; *Loach v. Farnum*, *supra*; *Cooke v. Murphy*, 70 Ill. 96; *Swansey v. Moore*, 22 id. 63; *Wheeler v. Frankenthal*, 78 id. 124.

The same principle was again applied by this court in *Moses v. Loomis*, 156 Ill. 392. In that case the court had under consideration the effect of a parol waiver of a covenant in a lease against alterations made by the tenant without the consent of the lessor, and it was held that it was within the power of the landlord to waive such covenant by parol. It is there expressly held that rights under sealed instruments may be waived by parol. This case seems to be decisive of the contention of appellants in the case at bar. It was there pressed upon the attention of the court, as it is here, that because the lease itself was a sealed instrument it could not be varied or abrogated by words not under seal. Notwithstanding this argument this court held that the landlord might properly, by parol, waive, and in that case had waived, the covenant in the lease against alterations without the consent, in writing, of the landlord. To the same effect is the case of *Starin v. Kraft*, 174 Ill. 120.

In the case of *Chicago and Eastern Illinois Railroad Co. v. Moran*, 187 Ill. 316, it was held that a provision in a contract under seal might be waived by a parol agreement. In that case a written contract provided that no stone other than that specified in the contract should be used without the written consent of the company's engineer. The evidence showed that the engineer orally consented and permitted the substitution of other stone, which was accepted and used by the company. It was held that an estoppel was thereby created which prevented the company from defeating the right of recovery because stone other than that mentioned in the contract had been used.

These authorities distinguish the case at bar from the line of authorities relied upon by appellants. The evidence in this case is uncontradicted that Mrs. Mishler made re-

peated declarations to the effect that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefor were a waste of money; that after the insurance company in which her husband had his insurance became insolvent she protested against his taking out other insurance for her benefit, and that appellee, acting on these repeated statements of his wife, did not take other insurance for her benefit. Under these circumstances it would be manifestly inequitable to allow her heirs to insist upon a forfeiture of the entire contract because this particular covenant was not performed, in view of the uncontradicted evidence that its non-performance was not only assented to but was urgently insisted upon by Mrs. Mishler in her lifetime. The parol evidence introduced was properly admissible for the purpose of showing that Mrs. Mishler waived the covenant in the ante-nuptial contract in regard to the life insurance, and such evidence justified the court below in finding, as it did, that there had been a waiver on her part of this covenant. There is nothing unreasonable or improbable in the evidence of the witnesses by whose testimony the waiver is established when the situation of the parties is considered. Mrs. Mishler had no children and no descendants of children. She was above seventy years of age. The evidence shows that she had ample means of her own to keep herself comfortable in case she survived her husband. The item of \$2000 life insurance was a matter of no serious consequence to her, and in view of her prejudice against life insurance generally, and the fact that the company in which her husband carried his insurance had become insolvent, it is not at all unreasonable that she would insist upon his not again re-insuring his life. At all events, the uncontradicted evidence shows that she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any

advantage of appellee's failure to continue the insurance for his wife's benefit.

The decree of the circuit court of Whiteside county being in accordance with the views herein expressed, will be affirmed.

Decree affirmed.

E. DOHERTY, Appellant, vs. SCHIPPER & BLOCK, Appellee.

Opinion filed April 19, 1911.

1. **CONTRACTS**—*right of a discharged employee to recover for breach of contract.* Where one employed for a fixed period is discharged without cause and is paid in full up to the time of his discharge he may treat the contract as continuing in force and bring an action for breach thereof, and if such suit is not begun, or if begun before is not tried, until after the term of employment has expired, he may recover the contract price of his wages for the unexpired term, less what he has earned or by the exercise of reasonable diligence could have earned since his discharge.

2. **SAME**—*theory of recovery for constructive services has been generally abandoned.* The theory of constructive services, under which a wrongfully discharged employee was permitted to bring successive suits and recover each installment of wages as it fell due for the unexpired term of the contract of employment, has been generally abandoned.

3. **SAME**—*a discharged employee must recover all damages in one suit.* An employee who has been wrongfully discharged before his contract of employment has expired may maintain only one action for breach of the contract and must recover in that action all damages resulting from the wrongful discharge, and one recovery is a bar to future actions for such damages.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

LUTHER C. HINCKLE, for appellant:

Where, under a contract for personal services, the wages are payable in installments, and before the term of services expires the master dismisses the servant without

his fault and the wages are paid to the time of dismissal, he may keep the contract in force and recover the successive installments as they severally fall due. *Cemetery Ass'n v. Weidenmann*, 139 Ill. 67; *Hamlin v. Race*, 78 id. 422; *Moore v. Kelley*, 111 Ga. 371; *Williams v. Luckett*, 77 Miss. 394; *Huntington v. Railroad Co.* 33 How. Pr. 416.

This recovery may be had under the rule of constructive service. *McEvoy v. Bock*, 37 Minn. 402; *Sterling v. Bock*, id. 29; *Horn v. Land Ass'n*, 22 id. 233; *Dodge v. Rogers*, 9 id. 223; *Building Society v. Lawton*, 49 id. 362; *Kahn v. Kahn*, 24 Neb. 709; *Beck v. Devereaux*, 9 id. 109; *Hallock v. Gagnon*, 4 Colo. App. 360; *Huntington v. Railroad Co.* 33 How. Pr. 416; *Weiler v. Henaric*, 15 Ore. 28; *Burritt v. Belfy*, 47 Conn. 323; *Badger v. Titcomb*, 15 Pick. 409; *Gordon v. Brewster*, 7 Wis. 355; *Booge v. Railroad Co.* 33 Mo. 212; *Isaac v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Colburn v. Woodworth*, 31 Barb. 381; *Wilkinson v. Black*, 80 Ala. 329; *Holloway v. Talbot*, 70 id. 389; *Fowler v. Armour*, 24 id. 199; *Liddell v. Chidester*, 84 id. 508; *Strauss v. Meertief*, 64 id. 299; *LaCousier v. Russell*, 82 Wis. 256; *School District v. Dreutzer*, 51 id. 153; *Howe v. Harding*, 84 Tex. 74; 76 id. 19.

The adoption of this rule is directly held in *Cox v. Bearden*, 84 Ga. 34, *Allen v. Engineers' Co.* 196 Pa. 512, and *Marx v. Miller*, 134 Ala. 347.

A contract of employment for a year at a specified salary per month, payable monthly, is equivalent to as many contracts as there are periods of payment; and where an employee is discharged and a recovery is had for the first month's wages, such recovery is no bar to a subsequent action for a balance of wages subsequently becoming due. *Williams v. Luckett*, 77 Miss. 394; *Isaac v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Allen v. Text Book Co.* 201 Pa. 579; *Allen v. Engineers' Co.* 196 id. 512.

The recovery may also be had on the theory of indemnity for loss of wages accruing by installments on successive contingencies, which is the rule now usually applied by the courts which adopt the doctrine of constructive service. *McMullan v. Dickinson Co.* 60 Minn. 156.

PAGE, WEAD, HUNTER & SCULLY, for appellee:

Where a servant is hired for a fixed period and is discharged without cause during the term, he must resort to a special action for the breach of the special agreement of hiring. The servant's damages result from a breach of the contract in consequence of the wrongful dismissal. Since the services have never been performed, *indebitatus assumpsit* for work and labor done cannot be maintained. The servant's remedy is necessarily for the recovery of damages, and not for wages as such. *Hull v. Heightman*, 2 East. 145; *Smith v. Hayward*, 7 A. & E. 544; *Archard v. Horner*, 3 C. & P. 349; *Hartley v. Harman*, 11 A. & E. 798; *Trustees v. Shaffer*, 63 Ill. 244; *Parmly v. Farrar*, 169 id. 606; *Russell v. Gilmore*, 54 id. 147; *Insurance Co. v. Baker*, 85 id. 410; *Higgins v. Lee*, 16 id. 495; *Algeo v. Algeo*, 10 S. & R. 235; *Cemetery Ass'n v. Weidenmann*, 139 Ill. 75; *Saxonia Co. v. Cook*, 7 Colo. 569; *Hearne v. Garrett*, 49 Tex. 619; *Chase v. Alaska Light Co.* 2 Alaska, 82; *Murray v. O'Donahue*, 96 N. Y. Supp. 335; *Fulton v. Heffelfinger*, 54 N. E. Rep. 1079; *Fulton v. Farber*, 62 N. Y. Supp. 742.

A servant wrongfully discharged before the expiration of the period of hiring has only three remedies: (1) He may sue at once for a breach of the contract and recover his damages up to the time the suit is brought, in which case judgment will be a bar to any further action; (2) he may wait till the end of the contract period and then sue for his damages caused by the breach; (3) he may treat the contract as rescinded and sue immediately on a *quantum meruit* for the services performed, in which case he

can recover only for the time he actually served. He can not treat the contract as existing and sue at each period of payment after the discharge, to recover the installment provided for by the contract, upon an averment of readiness to perform and upon the theory of constructive service. *Archard v. Horner*, 3 C. & P. 349; *Smith v. Hayward*, 7 A. & E. 544; *Elderton v. Emmons*, 6 C. B. 178; *Fewings v. Tisdal*, 1 Exch. 295; *Stone v. Bancroft*, 112 Cal. 653; *Sans Automatic C. C. Co. v. League*, 25 Colo. 129; *Richardson v. Eagle Works*, 78 Ind. 422; *Hinchcliff v. Koontz*, 121 id. 422; *Hamilton v. Love*, 152 id. 642; *Wood v. Morgan*, 6 Bush, 507; *Chamberlin v. McCalister*, 6 Dana, 352; *Olmstead v. Bach*, 78 Md. 132; *Smith v. Lock Co.* 4 N. J. L. 312; *Howard v. Daly*, 61 N. Y. 362; *Perry v. Dickerson*, 85 id. 345; *Glass Co. v. Stoehr*, 54 Ohio St. 226.

The contract between appellant and appellee was an entire contract, and there can be but one action to recover damages for the breach of such a contract. *Norrington v. Wright*, 115 U. S. 188; *Pakas v. Hallingshead*, 184 N. Y. 211; *Railway Co. v. Nichols*, 57 Ill. 464; *Leopold v. Salkey*, 89 id. 412; *Larkin v. Hecksher*, 51 N. J. L. 133; *Rosenmueller v. Lampe*, 89 Ill. 212; *Carmean v. North American T. & T. Co. L. R. A. (N. S.)* 595; *Olmstead v. Bach*, 78 Md. 131; 1 Sutherland on Damages, (3d ed.) 312.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action commenced by E. Doherty against Schipper & Block, a corporation, before a justice of the peace in Peoria county, to recover for eight weeks of service, at \$25 per week, rendered by the plaintiff to the defendant as a milliner trimmer in its store, in the city of Peoria. The plaintiff recovered judgment for \$200. The defendant appealed to the circuit court, where the case was tried before the court without a jury, and plaintiff recovered in that court judgment for \$200. Schipper & Block

prosecuted an appeal to the Appellate Court for the Second District, where the judgment of the circuit court was reversed without remanding the cause, and a certificate of importance having been granted, the appellee in the Appellate Court has prosecuted an appeal to this court.

It appears from the evidence that the appellant was employed by the appellee for eighteen weeks at \$25 per week, payable weekly. At the end of the ninth week the appellant was discharged, as she claims, without cause. On the day she was discharged she was paid in full. She returned on the day following her discharge and offered to continue work but was refused permission to work. At the end of the following week she brought suit before a justice of the peace for one week's wages and recovered a judgment for \$25 and costs, which appellee paid, a transcript of which judgment was introduced in evidence on trial of this case.

The trial court refused to hold the following proposition of law offered by the defendant: "The court holds that the recovery of the judgment and a satisfaction of the same, as shown in the evidence in this case, in the suit formerly brought by the plaintiff against the defendant before William Fielder, then a justice of the peace in and for Peoria county, Illinois, is a bar to the plaintiff's right of action in this case, and the plaintiff cannot recover in this suit, and the finding must be for the defendant."

The sole question raised in this court and argued in the briefs filed by the respective parties is, was the first judgment rendered by the justice of the peace a bar to this action?

It is well settled that in case an employee is discharged without cause before his term of employment has expired and he has been paid in full up to the time when he is discharged, he may treat the contract of hiring as continuing and bring an action for a breach of the contract of employment against his employer for discharging him, and if the suit is not commenced, or if commenced before but not

tried, until his term of employment has expired, he may recover the contract price of his wages, less what he has earned or by reasonable diligence could have earned in other employment subsequent to his discharge. (*Mount Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67.) There is a class of cases which holds this remedy is not exclusive, but that, in addition to such remedy, the employee, where his wages, by the terms of the contract, are payable in installments, may bring an action for each installment of wages as it falls due, subsequent to his wrongful discharge, and that the recovery on one installment is not a bar to the recovery on subsequently accruing installments. (*Gandell v. Pontigny*, 4 Camp. 375.) The recovery for each installment of wages allowed in the class of cases referred to, as it falls due, is based upon the theory of constructive service, and while the right of a recovery was thus permitted for a time in England and in the courts of some of the States in the Union, that theory of recovery has been abandoned in England, (*Archard v. Horner*, 3 C. & P. 349; *Smith v. Hayward*, 7 Ad. & Ell. 544; *Fewings v. Tisdal*, 1 Exch. 295;) and quite generally in this country. (*James v. Allen County*, 44 Ohio St. 226; *Howard v. Daly*, 61 N. Y. 362; *Richardson v. Eagle Machine Works*, 78 Ind. 422; *Olmstead v. Bach & Son*, (Md.) 22 L. R. A. 74.

This court does not seem to have passed specifically upon the precise question presented here for decision, although in dealing with other questions growing out of the relations which exist between employer and employee the court has at times used language which might indicate a recovery could be had for the several installments of wages as they fall due, while at other times expressions have been used by the court which would indicate that such recovery could not be had. (*Hamlin, Hale & Co. v. Race*, 78 Ill. 422; *Mount Hope Cemetery Ass'n v. Weidenmann*, *supra*.) We have examined the numerous cases bearing upon the subject which have been cited in the briefs, and are of the

opinion that upon principle the only action which logically can be maintained, upon the facts of this case, against the appellee, is an action for the breach of the contract of employment growing out of the wrongful discharge of the appellant, and that all damages resulting from such breach must be recovered in one action, and that after one recovery has been had that recovery is a bar to all future actions based upon the contract of employment or growing out of the relation of employer and employee by reason of the wrongful discharge of appellant.

We think the doctrine of constructive service, as applied to a case like this and where used as a basis of recovery, is illogical and unsound. This court has universally held that the proper measure of damages in a case like this is the contract price, less what the employee earned or could have earned. That being so, if the discharged employee can find employment it is his duty to accept it. How can it then be said that while he is performing service for another person he is constructively engaged in the employ of the employer by whom he was discharged? The result of this doctrine would be that the employee was actually performing service for one person while he was constructively performing service for another. The only true basis upon which an action like this can rest is for damages for breach of contract, and as the breach of contract occurs at the time of the discharge the cause of action is then complete, and such cause of action cannot be split up but all the damages must be recovered in one judgment and in the first action, and this being true, no subsequent action can be based upon the cause of action which has been merged in the first judgment. We therefore conclude that the judgment recovered before the justice of the peace was a complete bar to the subsequent action.

The conclusion of the Appellate Court was correct, and its judgment will be affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs HALDANE CLEMINSON, Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. CRIMINAL LAW—*trial of criminal case should be confined to the issue.* A criminal trial is instituted for the purpose of ascertaining whether the accused is guilty of the offense charged, and the evidence should be confined to that issue.

2. SAME—*evidence tending only to show that defendant is immoral is not competent.* In a murder trial, evidence tending only to show that the accused is an immoral man, and having no possible tendency to throw any light upon the issue in the case, is not competent.

3. SAME—*practice of court calling witness should be limited to proper cases.* The practice of having the court call a witness in a criminal case whom a party desires to interrogate without vouching for his testimony, should not be extended to persons who were not eye-witnesses of the crime or who have no knowledge of the facts, and the cross-examination should not be allowed to go beyond the issue involved.

4. SAME—*it is prejudicial error for court to call witnesses and allow an unlimited and irrelevant cross-examination.* It is prejudicial error for the court, at the request of the State's attorney, to call witnesses in a murder trial who have no knowledge of the facts, and, after asking a few questions, permit the State's attorney to conduct an exhaustive and irrelevant cross-examination bringing out matters of a nature very damaging to the character of the accused and throwing no light on the issue; and such error is ground for reversal if there is any room for reasonable doubt of the guilt of the accused under the competent evidence.

5. SAME—*when judgment will not be reversed though error in admitting evidence was flagrant.* Error in the admission of evidence having no tendency to prove the crime charged but only to show that the accused was an immoral man and guilty of criminal practices in his profession is not ground for reversal, where the competent evidence in the record so conclusively establishes the guilt of the accused that there is no room for reasonable doubt.

6. The court reviews the evidence in this case at length, and holds that it excludes all reasonable hypothesis of the death of the defendant's wife from any cause other than chloroform, as well as all reasonable hypothesis that the chloroform was self-administered or administered by any person other than the defendant, and that it conclusively establishes his guilt.

COOKE and DUNN, JJ., and VICKERS, C. J., dissenting.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. WILLIAM H. MCSURELY, Judge, presiding.

BURRES & MCKINLEY, and E. J. GREEN, (ELIJAH N. ZOLINE, of counsel,) for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (JOHN E. NORTHUP, and WILLIAM E. RITTENHOUSE, of counsel,) for the People.

Mr. JUSTICE FARMER delivered the opinion of the court:

Plaintiff in error (who will hereafter be called defendant) was indicted in Cook county for the murder of his wife, Nora Jane Cleminson, in the city of Chicago, on the 30th day of May, 1909. The first, second, third, fifth, sixth and seventh counts of the indictment charged the defendant murdered his wife by administering chloroform to her, and the fourth charged the death was caused by administering a poison, the character of which was to the grand jurors unknown. Defendant pleaded not guilty, and after a trial lasting substantially a month the jury found him guilty of murder and fixed his punishment at imprisonment for life in the penitentiary. Motions for a new trial and in arrest of judgment were overruled and judgment rendered on the verdict. This writ of error is sued out by defendant to reverse the judgment of conviction.

Defendant was married to Nora Jane Morgan in Michigan on Thanksgiving day, 1903. At that time both parties resided with their parents on farms near South Haven, Michigan. Their first child was born in September, 1904. A few weeks after that event defendant went to Chicago to study medicine. Shortly afterwards his wife, his mother and father moved to Chicago, and the two families lived together about three years. Another son was born to defendant and his wife in June, 1906, and some time afterwards defendant, his wife and children moved into a flat

about eight blocks distant from the defendant's father and mother. Defendant was pursuing his medical studies and assisting in supporting his family by working at different kinds of employment. Defendant's family and that of his parents visited each other very often, and they usually had their dinners together on Sundays at the home of defendant's parents. In August or September, 1908, defendant and his wife moved to another flat about five blocks distant from his parents' home. Defendant graduated in medicine in 1908, and in September of that year engaged in the practice of his profession. About five o'clock in the morning of May 30, 1909, the defendant telephoned Dr. Hullhorst, who lived a few blocks distant, to come to his house. Dr. Hullhorst testified the defendant said to him over the telephone, "Come down to the house as soon as you can; it looks as if an earthquake had struck the place; we have been done up." Dr. Hullhorst went at once, arriving at defendant's house about ten minutes past five. The door was not fastened and the doctor walked in without knocking or ringing the bell. Dr. Hullhorst had attended defendant's wife when she gave birth to her second child. He testified when he went in the house defendant was lying on the floor in the dining room, dressed in pajamas and a bath robe. He inquired of defendant what was the matter, and defendant replied, "We have been done up; we have been robbed; we have been chloroformed." The doctor asked him where his wife was. He replied she was in the bed-room, and said, "I don't know what is the matter with her; I believe she is dead." The doctor went to the bed-room and found her body on the bed. She was dead, cold and rigid, and the doctor gave it as his opinion that she had been dead four or five hours. The doctor then went back in the room where defendant was and informed him his wife was dead. He asked defendant to tell him about it, and defendant said he did not know how it happened; that he awoke in the night and felt as if he had been sick and feverish all night;

that he touched his wife with his foot and found she was cold; that he then jumped out of bed and hardly knew what had happened since. The doctor testified he then examined defendant, felt his pulse and found it was accelerated, fast, strong and full. He had no fever and the doctor did not then prescribe anything for him. There were no indications that he had been chloroformed and the doctor found no receptacle containing chloroform. Deceased was lying on her left side on the front of the bed, near the edge. Her head was thrown back slightly and her mouth was open. The left hand was under her face and the right on her breast. Her legs were slightly flexed. On the back of the bed the covers were thrown back, and it appeared as if someone had occupied that part of the bed. The bed covers were over the body of the deceased up to the face but were not over the face. Half of a napkin was found under the face of the deceased and another half under the sheet at the back of the bed, next the wall. They were apparently parts of the same napkin. Dr. Hullhorst smelled both pieces but could detect no odor. On the sheet at the back of the bed was a dark-colored stain, but the doctor did not examine it carefully. He then talked again with defendant, who said, "This is tough," but that he could stand it if it were not for the boys. Defendant told the doctor if there was any occasion for an undertaker, to call Fred Roberts. The doctor replied it was not a case for the undertaker but for the coroner. He had previously notified the police station. Two police officers, Wood and Smith, arrived about six o'clock while Dr. Hullhorst was still at defendant's house. Shortly afterwards defendant's mother and his wife's sister, Miss Cecilia Morgan, who boarded with defendant's parents, came. Later Roberts, the undertaker, came, but the police officers would not allow him to go into the house and take charge of the body. Dr. Hullhorst further testified that when he entered defendant's residence he found the drawers had been taken out of the furniture and papers

and books scattered over the floor. In the dining room the drawers had been drawn out of the sideboard and linen scattered over the floor. In the bed-room the drawers had been taken out of the dresser and clothing scattered over the room. Defendant told the doctor they had been robbed of silverware and \$40 or \$50. Describing more fully defendant's condition when he found him lying on the floor, the doctor said he was gagging, trying to vomit, and crying, but he saw him vomit nothing but saliva. The doctor got him up and placed him on a couch. Afterwards he dressed. All the windows in the house were closed, except one, and that was open about an inch. The doctor gave it as his opinion the defendant was feigning the symptoms he manifested.

Policeman Wood testified he arrived at defendant's house about 5:45. He described how the drawers were pulled out of the furniture and their contents scattered over the floor and the jewelry case open and empty. He testified there were a great many half-burnt matches scattered over the floor in all the rooms. When he arrived defendant was lying on the floor, but he did not talk to him until after he had gone into the bed-room and viewed the body of deceased. He described her position the same as Dr. Hullhorst. He testified he then went back into the room where defendant was and asked him to tell what had occurred; that defendant replied, "You are a reporter and I will not talk with you," and turned his face away and gagged. He testified that he and his fellow-policeman made a systematic search of the house, and that they found footprints outside the house under the window of the bed-room where the body of Mrs. Cleminson lay. They then went into the house and procured defendant's left shoe and fitted it into the tracks that led up to the window. They then discovered that the track of the right foot was deeper than that of the left. They then procured the right shoe and placed it in the tracks and found that it fitted them exactly. They

examined the windows and screens to see if they had been forced open and found them intact, except one screen in the dining room window had been removed and was on the sidewalk. The witness then again asked defendant what had happened, and he replied, "Somebody must have been in the house," and inquired where they got in. The witness replied he did not know, and defendant said they must have gotten in through the window because the screen was out. The witness asked defendant what he had that burglars could take and what was missing, and defendant said his wife's engagement diamond ring, his stick-pins, and \$50 in money out of his pants pocket. Witness inquired where his pants were, and defendant pointed to a chair and said he left them on the chair the night before. The witness found the pants folded up behind the chair on the floor, also a small, black leather pocket-book lying open beside them on the floor. The silver spoons were found by witness and his fellow-policeman in the kitchen. When witness would ask defendant where the jewelry was kept he would reply that he was sick, and did not answer the inquiry. He continued to gag for a considerable time. His mother asked him to dress himself and he finally did so. He talked a great deal to himself, or apparently to no particular person, about burglars, and inquired why they came in there and killed such a sweet little woman when they were getting things in shape to enjoy life. At one time defendant went with his mother into the room where the body of his wife lay and said he wished they had got him instead of her. He told the witness that chloroform had been used and said he could taste it in his mouth. Dr. Hervey, who was an assistant of defendant, came after the witness had arrived and defendant asked him to call an undertaker. That was about half-past seven. Hervey did so, but the witness told him it was no use until the coroner came there. Hervey asked witness if he could go into the room and look at the body. Witness told him he could do so and went with him. Her-

vey touched the body with his hand and then drew out from under the face a napkin. Froth was coming out of the mouth of the body and the napkin was moist from it. Witness then stopped Hervey and called Dr. Hullhorst. The doctor came in, opened the napkin, smelled of it, then raised up the sheet, and another napkin, or part of one, dropped out of its folds. The doctor smelled of that also and laid it down again. The witness smelled both napkins but could detect no odor. The two pieces of napkin found in the bed were of the same pattern as another napkin found in some soiled clothing in the children's bed-room. Witness asked defendant if it was possible to kill anyone with a little cloth like the napkin found in the bed, saturated with chloroform. He said it was if the person were asleep and it were put under the face and the bedclothes thrown over him so he could not get air. He said if a person could get no air chloroform would kill very quickly. A lieutenant and sergeant of police who came about this time had considerable talk with defendant in the presence of witness, and he told them it must have been about four hours after he had eaten supper that he was chloroformed; that as a physician he knew that his food had digested. He told them the same story about the jewelry and money being taken, and also a gold watch. The sergeant searched his trousers and found the watch in his pocket. He asked defendant why he did not call the police, and the defendant said he used his last nickel in calling Dr. Hullhorst. Dr. Reinhardt, the coroner's physician, came and took charge of the body, opened it, removed and examined the brain and other organs, or parts of them. Mrs. Cleminson was about eight months advanced in pregnancy. Police officer Smith substantially corroborated the testimony of Wood, except that he did not hear all that Wood testified defendant said in the different conversations had with him.

Lieutenant Culnane testified he arrived at defendant's house about 8:30 in the morning, in company with Ser-

geant O'Brien. Wood and Smith were there when he arrived. He talked with the defendant, who claimed that burglars had been in his house and robbed it. He asked defendant why he didn't call the police station. Defendant said he didn't have a nickel. The witness told him he didn't need a nickel to call the police station, and defendant said he tried to get the station but could not. Witness asked him why he could not, and defendant made no reply. Witness found deceased's diamond ring and defendant's stick-pins in defendant's coat pocket, in a closet. Defendant was taken by the police to the Alexian Brothers' Hospital about four o'clock in the afternoon. Sergeant O'Brien testified that he asked defendant to give him a report of the matter and inquired what time he went to bed. Defendant said he went to bed about ten o'clock; that he was a heavy sleeper and fell asleep very soon after retiring; that he woke up about five o'clock in the morning, very sick at his stomach, and called his wife and asked her to get up, as he was very sick. She didn't answer, and he then reached over his hand and touched her and found she was cold and dead; that he then got up and telephoned Dr. Hullhorst. At this point Dr. Hervey spoke to the witness and said he wished the witness would not talk any further to defendant, as he was very weak. Defendant said he was getting chills, and got up and put his overcoat on over his bath robe and laid down on the lounge. The witness described the appearance of the house, and the drawers being pulled out, substantially as the other witnesses had done. He testified to making a careful examination for evidence of the house having been entered by burglars and found none. The witness and Lieutenant Culnane searched the house for chloroform. They found a number of bottles in a medicine case, none of which was labeled chloroform and none of which contained chloroform that they could detect by the smell. All bottles found were put in a box and given to an officer to take to the station.

Edward Strum, a police officer, testified he arrived at defendant's house about nine o'clock on the morning of the 30th of May. When he arrived Dr. Reinhardt, Roberts, the undertaker, and his assistant, Dr. Hervey, Lieutenant Culnane, Sergeant O'Brien and officers Smith and Wood were in the house, also defendant's mother. Witness testified he heard Roberts, the undertaker, ask defendant about arrangements for the funeral; that defendant said, "You know my circumstances as well as I do; my intention was to have her cremated;" that his mother heard him and said, "Oh! dear, that would never have been her wishes." Defendant then said, "All right, then; proceed." Witness testified he told defendant's mother he was a police officer, and she said, "This is awful," and defendant said, "Well, I understand this thoroughly; it is up to them to investigate and find the guilty party if they can." The witness accompanied defendant to the Alexian Brothers' Hospital, and testified that Dr. Rettig, of that hospital, after some examination and feeling of the pulse of defendant, said to him, "You, as a practicing physician, know what a time we have putting anyone under the influence of chloroform; the burglars, by spilling chloroform in that room, would hardly have done that; you would have to get a cloth or something and cover the face with it." Defendant made no reply. Witness said to defendant, "It seems they don't take much stock in the burglary and chloroform story." Defendant replied, "If it is not burglars I suppose it is up to me." Witness testified the doctors at the hospital proposed to pump out defendant's stomach; that he first objected but finally submitted to it. Witness testified he went out awhile and afterwards returned and asked defendant if he thought his wife would take anything without consulting or seeing him; that defendant said he didn't know what she might have done; that she had full knowledge of medicine. The witness then asked the defendant if he felt like talking to him about the matter. Defendant inquired if the

witness was a Mason, and on being informed he was not said he was sorry,—that if he were a Mason he might confide in him.

Frank A. Jernigan, a police officer, testified he was at defendant's house May 30, and described conditions and appearances in the house substantially the same as other witnesses had. He testified to finding or seeing in the house a hypodermic syringe and bottles containing drugs. Among the medicines found was a small case made by the Abbott Alkaloidal Company, with bottles in it. Defendant testified the bottles contained morphine alkaloidal tablets, strychnine alkaloidal tablets, and one other that he could not remember.

Dr. Brune, of the Alexian Brothers' Hospital, testified he examined defendant and found his heart action rapid but no evidence of disease. Defendant had taken a number of drinks of liquor during the day and the witness testified he observed an alcoholic smell about him. He tested the urine and examined the contents of his stomach but found no evidence of chloroform. From the hospital defendant was removed to the Sheffield avenue police station.

George McGowan, a police officer of the Sheffield avenue station, testified that he, with other police officers, accompanied the defendant to the funeral, which occurred on June 1; that they visited defendant's father's house and that defendant there went in the bath room and washed and combed. Witness asked, "How did this thing happen, anyhow?" and defendant replied, "Officer, I could tell you, but I will explain everything afterwards." The witness testified that on their return to the station from the funeral the defendant said, "I didn't realize what I was up against or I should have told the truth." On arriving at the station defendant was locked up in a cell, and witness testified that about fifteen or twenty minutes afterwards he talked with defendant; that he asked him how he was feeling, and defendant said all right, but that there were better places.

The witness asked him why he didn't tell Capt. Kane how the matter happened; that it would be better for him to do so. Defendant replied he didn't know the captain well enough, but if the witness would get Clifton Woolridge he would talk with him. Defendant belonged to the same Masonic lodge that Woolridge belonged to. Witness testified that he notified Woolridge, and that Woolridge talked with defendant about eight o'clock the same evening. The witness testified that on June 4 he took defendant from the Sheffield avenue police station to the Rogers Park police station for the inquest and on the way asked defendant how his wife came to her death. Defendant said that on the evening before her death he took a hot bath and went to bed about ten o'clock; that he did not know what time his wife went to bed. He said she took chloroform.

William M. Parker, a police officer of the Sheffield avenue police station, testified he went to the cell of defendant on the night of May 31 and told him he would like to talk to him, but defendant said he did not want to talk,—that he had nothing to say. Witness next saw defendant the next night after he was taken from Capt. Kane's office back to his cell, and inquired of defendant how he felt. He testified defendant said he felt better. Witness informed him that Capt. Kane had said he (defendant) had told him all. Defendant said he had, and witness asked him what he told the captain. Defendant refused to state and told him to ask the captain. Witness said he would rather have defendant tell him, and defendant asked witness if he was a married man. Witness answered that he was, and defendant said, "Love, friendship and honor go a long way until children commence to come; well, things were that way in my family until children commenced to come and then it was different; things have not been, since children commenced to come, as they were prior to that." Witness then asked about the burglary story, and defendant said, "Oh! that was a fake; I made that up to save the honor of my

family and my children." Witness then asked how about the chloroform, and defendant said, "I made that up, too." Capt. Kane then came in and told witness to bring defendant up to his office. He did so, and Capt. Kane asked defendant if there was anything he thought of that his wife could have taken. He said there was a bottle of dope in the medicine cabinet that he had fixed up for a student in a hospital; that it had chloral and some other kinds of drugs in it. Defendant said after he fixed it up for the student he found out what he wanted to use it for and would not give it to him; that his wife might have taken that. He said he did not know the name of the student nor where he lived. The witness testified that on the morning of June 9 he was in Capt. Kane's office. Defendant was also there, and Capt. Kane asked him what he could do for him. Witness said the defendant replied that Capt. Kane could do him a favor that would do him a lot of good and do the captain no harm. Capt. Kane asked him what it was, and defendant said, "I want you to eliminate that part of my statement that I made to you about my wife's unfaithfulness." The captain said he could not do it, and the defendant replied he could if he wanted to. Capt. Kane said he could not do it and asked defendant if he wanted him to perjure himself, and defendant said then that he did not want anything more to do with the captain.

Clifton R. Woolridge, a police officer and the man defendant expressed a desire or willingness to talk to, testified he went to the police station where defendant was detained about eight o'clock the evening of June 1 and there first talked to Capt. Kane about ten minutes. Witness then went to the cell where defendant was and asked him if he wanted to talk with him (witness.) Defendant said he did. The cell was unlocked and witness and the defendant went to Capt. Kane's office. Witness testified he told defendant the police had made an investigation of the burglary charge and that there was nothing in it and advised defendant to tell

the truth and clear the matter up. They talked at considerable length, and defendant said he was innocent but that the story about the burglary was not true. He said his wife attempted suicide about two weeks before her death but that he discovered it and saved her. He said that they were not mated but that she was a good housekeeper; that he told the burglary story to save the honor of his family. Witness advised defendant to talk to Capt. Kane, and he consented to do so. Shortly afterwards Capt. Kane came in and witness told him defendant had admitted the burglary charge was not true, and the defendant then had a talk with Capt. Kane.

Capt. Kane testified he was captain of the Sheffield avenue police station; that on the night of May 31 he endeavored to talk with the defendant, but that the defendant refused to talk and said he had been advised by his counsel not to do so. He declined to tell who his counsel was or where his office was. Witness next saw defendant about ten o'clock on June 1 but had no talk with him. After the funeral he again saw defendant, with Woolridge, in the office. Witness left the room after having first talked with Woolridge before defendant was brought into the office. Woolridge and defendant were in the witness' office a little more than an hour, during which time the witness heard nothing that was said between them. Afterwards Woolridge called the witness in and said he pitied the defendant and thought witness would when he heard his story. He started to tell the story, and defendant interrupted him by asking him if he thought that was the proper thing to do. Woolridge said he thought it was; that Capt. Kane was in charge of the district and it was his duty to make a thorough investigation, and he asked defendant to tell the captain what he had told him. Defendant asked Woolridge to tell the story, and in his presence Woolridge stated defendant told him that he and his wife had not lived as man and wife for over two years; that the unborn child she

was pregnant with was not his; that she had attempted, about two weeks before her death, to commit suicide on account of her shame, and defendant told the burglary story to save the honor of his children; that it was true defendant wanted his wife to get rid of the child, and said if she would do so he was willing to forgive her but he could not bear the thought of raising another man's child with his own boys. Witness asked defendant if that was true, and he said it was. Witness then asked defendant what was the origin of the trouble between him and his wife, and defendant replied he had been out all of one night taking care of persons who were injured in the Northwestern "L" road accident, and when he arrived home next morning, tired, sleepy and hungry, his wife asked him abruptly where he had been all night. He told her he was out with a lady friend. She said all right, if he was doing that kind of thing she could too. Defendant said he did not then believe she would do such a thing. He said he had no desire for sport; that his pleasure was with women; that he had a strong passion for them; that he and his wife were not mated; that their desires were not at all alike; that she was a good woman and a good housekeeper, but a man wanted something more than that. He said he was satisfied he had made a bad job of the burglary scheme. Defendant told witness not to say anything about what he had said about his wife. Witness then left for a short time, and when he returned the defendant was in his cell and several newspaper men were in the witness' office. Witness took them back to the cell house and told defendant they wanted to interview him on the burglary story. One of them asked him why he concocted that story, and he said to preserve the honor of his children. The reporter asked him what he meant by it, and he said, "I have told everything to Capt. Kane, and he can tell you if he wants to." They then asked the witness what he said, and witness told them to get defendant to tell the story. Later, the witness had de-

fendant brought to his office again, and asked him if there were any poisonous drugs in the medicine case that his wife could get hold of. He said he did not think there were, but there was a bottle of dope he put up for a student at Hahnemann Hospital, but on learning the student wanted it for knockout drops in saloons and bar-rooms he refused to give it to him. He said he didn't know the name of the student nor his address. The next morning witness again talked to defendant, and told him he was not satisfied with the statement defendant made to him and Woolridge the night before. Witness told defendant nothing he had said would aid him more than his wife's infidelity. Defendant said he didn't want that brought up; that he was sorry he had told Woolridge, and Woolridge had no right to mention it. Witness then went over some of the statements made the night before to witness and in the presence of the newspaper men, about defendant's relations with his wife, and stated that it seemed an unreasonable story and that he should do all he could to clear it up. Witness called defendant's attention to his previous statement about his passion for women and that although he had slept with his wife nearly every night they had had no sexual relations for two years, and told defendant the statement was unreasonable, to which defendant made no reply. Witness then asked the defendant how he accounted for his wife's death. He replied that about two weeks before her death her heavy breathing aroused him one night and he first thought she had taken morphine; that he got up and gave her strychnine in small quantities to make her vomit. Witness asked defendant if he understood him correctly to say he gave his wife strychnine in small quantities to make her vomit, and defendant replied he did; that he gave her hot water to drink and walked her around the room until she had recovered sufficiently to let her go to bed and go to sleep. Defendant said he talked with his wife next morning but she would not disclose what she had taken. He prescribed

nothing further for his wife. He said they had together drank a bottle of Pluto water the night before her death. Witness asked him whom he believed to be the father of the unborn child, and he said he was sure it was not his; that this was the reason he wanted his wife to get rid of it; that the thought of raising it with his own children almost wrecked his mind. Witness asked defendant if it affected his mind that way after he had agreed with his wife that she might go her way and he would go his, and inquired if she didn't have as much right to go outside as he had. He said yes, but he never thought she would do it. He said his wife had no life in her,—had no passion,—and would lie in bed like a log. Witness asked defendant if he slept with his wife the night before her death. He replied he did, and witness told him he didn't think he was telling the truth; that his story didn't sound reasonable, and again asked defendant if he slept with his wife the night before her death. Defendant said, "It is none of your damn business; I won't talk with you any more; you are trying to put a rope around my neck; I am through with you." Witness had another talk with defendant in his office June 9. Defendant was brought into the office and witness inquired what he could do for him. Defendant said witness could do him a favor that would do witness no harm and might do the defendant some good. Witness inquired what it was, and defendant asked him to eliminate all he had said about his wife's unfaithfulness in his conversation. Witness told the defendant he could not do so. Defendant replied he could if he wanted to. The witness said he could not without perjuring himself.

Dr. Fisher, defendant's partner in the medical practice, testified that defendant told him his wife knew that he was sometimes out in the company of ladies. Defendant said he was of a more active, passionate disposition than his wife, and that for that reason he was sometimes forced to

seek the company of other women and that his wife was aware of that fact.

Cecilia Morgan, a sister of the deceased, boarded at the home of defendant's parents and saw her sister every Sunday and frequently oftener than once a week. She last saw her sister alive on Saturday evening, May 29, between four and five o'clock, with her two children, at the defendant's mother's. She seemed perfectly well and took home with her a tomato plant, and witness saw it planted in defendant's back yard the following day when she went there after her sister's death. Witness testified her sister had for three or four weeks before her death been sewing on the wardrobe of her expected child. When the witness last saw her sister she was happy and cheerful. She never saw any manifestation of love and affection between her sister and defendant, but testified to occasions when she observed defendant treat his wife coldly and indifferently. They never went out together. Deceased took care of her children and did her own housework.

Hilda Morgan, another sister of deceased, last saw her alive on Wednesday before her death at the home of deceased, where witness took supper. Her health was good. Witness saw her on an average of once a week. About a month before her death defendant told witness as soon as he could afford it his wife could go her way and he would go his and she could have the children. Witness knew her sister was pregnant and had prepared a wardrobe for the expected child. Witness testified her sister was of a happy, cheerful frame of mind and disposition.

Mrs. Frank Bulow, a married sister of deceased, testified she saw deceased every two or three weeks the last year of her life, and that her health was good. The last time she saw her was about three weeks before her death. She testified about being at her sister's house on one occasion when the defendant treated his wife with coldness and indifference without any cause. Frank Bulow, husband of

the last witness mentioned, testified that in February before the death of defendant's wife he had a talk with defendant, in which defendant said the children were the only thing that kept him and his wife together. Witness testified that defendant's treatment of his wife was cold and indifferent.

Defendant testified in his own behalf, and said when his wife was about two months advanced in pregnancy he advised her to submit to an abortion, but she declined to do it; that she said she thought it was not right; that where there was life to destroy it would be murder. Defendant testified his reason for wanting to produce an abortion was for the benefit of his wife's health.

The proof shows defendant's mother was very kind and helpful to the deceased. She testified in behalf of defendant that his relations with his wife were pleasant and agreeable, but, proper foundation being laid therefor, she was contradicted by Cecilia Morgan and Mrs. Bulow, who testified Mrs. Cleminson said to them that she hoped the child with which deceased was pregnant would not be born alive; that with no more love than there was between defendant and his wife they ought not to have another child; that she had prayed so long that they would live happily together she was almost ready to believe there was no God. Mrs. Bulow testified that on May 22 defendant's mother asked her to speak to defendant about treating his wife better. Frank Bulow testified that about a week before the death of defendant's wife his mother said she felt very sorry for the way her son treated his wife and asked him to speak to her son about it, and witness replied that it usually did more harm than good to interfere in family affairs. Mrs. Cleminson had previously denied making any of these statements. There were several other witnesses not referred to whose testimony, in a greater or less degree, corroborated the testimony of the witnesses whose names are mentioned.

Dr. Reinhardt, the coroner's physician, testified to the position and the appearance of the body when he arrived

at defendant's house, about 9:45 in the morning of May 30. He testified that there was a stain on the sheet about the size of his hand, of a greenish-brown color, that appeared to be vomit. Under the sheet was a pad which was not soiled, but the mattress under the pad had a stain about the same size as that on the sheet. He examined the body and found no injury of any kind. He caused the body to be placed on a board and straightened the limbs by force. In his opinion deceased had been dead from four to twelve hours. The body had attained its maximum degree of stiffness. The doctor opened the body by an incision from the chin to the pubes, and described particularly how he laid bare the organs of the body and the manner of conducting the post-mortem examination. The internal organs from the lungs to the bladder were acutely congested,—filled with blood. He removed the brain and made an examination of all the vital organs and found no diseased conditions. Deceased was about eight months advanced in pregnancy. The foetus was normal in every way and no injury or violence had been done to any of the private organs. There was no irritation or redness of the face. The doctor removed a portion of the lungs, the stomach, with its contents, the heart, kidneys, spleen, and nine or ten inches of intestine, to which was attached a part of the duodenum next to the stomach. They were placed in Mason fruit jars found in defendant's house by his mother and taken away by the doctor and by him delivered next day to Dr. Haines and Prof. LeCount at Rush Medical College laboratories. The brain was taken to the undertaker's by his assistant, where it was kept in a vessel containing formaldehyde and covered with absorbent cotton.

Drs. LeCount, Haines, Wesner and Webster testified to examining the organs brought to the laboratory by Dr. Reinhardt. Some of them examined the organs microscopically and others made chemical analyses. Different tests were used for the discovery of poison, and one, at

least, of the doctors making the chemical analysis subjected the stomach contents to tests for the discovery of chloral hydrate and morphine. No poison of any kind was found in any of the organs except chloroform. In the stomach there were found two and one-half grains of chloroform, in the lungs two and one-half grains and in the brain one and one-tenth grain, which would be equal to about eighteen drops. These doctors were all qualified, by education and experience, for making the examination of the organs for poisons and for determining whether the organs were in a healthy or diseased condition, and from the results of their examination to testify as experts as to what, in their opinion, was the cause of death. Their testimony is very voluminous, but it is only necessary to say that the result of it was that they found chloroform in sufficient quantities to produce death, and in their opinion the death was the result of chloroform and not of any other poison nor of any diseased or unhealthy condition of the organs. It was also their opinion, from the appearance of the stomach, that the chloroform was taken by inhalation. They found no free globules in the stomach and no irritation that would have resulted if the chloroform had been swallowed. Dr. Moorehead, an expert anæsthetist, and one or more of the other doctors referred to, testified that in their opinion death could not have resulted from saturation of the napkin placed under the face of deceased in the position testified to by witnesses who saw it after her death.

The proof for the prosecution shows that the defendant had little, if any, love and affection for his wife; that he had relations with other women; that he tried to persuade his wife to submit to an abortion, which she declined to do. It also shows, satisfactorily, we think, that the death of Mrs. Cleminson resulted from chloroform taken by inhalation. There is no proof of any condition of mind or conduct of deceased that would lead to the suspicion of suicide or that she ever manifested any suicidal tendency, except

the statement of defendant that he thought she attempted suicide about two weeks before her death. The testimony of other witnesses as to this illness of Mrs. Cleminson, her appearance and conduct, and recovery therefrom, and the actions and conduct of defendant immediately following it, was such, in our judgment, as to justify the jury in giving no credence to defendant's statements. The proof shows deceased was devotedly attached to her children; that she was an excellent mother; that she was not melancholy or despondent at the prospect of the coming of another child, and, except the statement of her husband referred to, there is no proof of any act or word of deceased to indicate that she was tired of life. The fact that the evening of the night she died she took from her mother-in-law's a tomato plant and planted it in her own back yard would seem to indicate she at that time entertained no thought of self-destruction. After defendant knew his wife was dead, according to his own story, he made elaborate preparations to corroborate the story invented by him that burglars had broken into the house, chloroformed himself and wife and robbed them of money, property and jewelry. After he had repeated the story of the burglary to a number of persons he was told the investigation made by the police discredited the burglary theory, and the property he said was stolen was found in the house, some of it in the places where it was usually kept and some of it where he had placed it in disarranging the house. He then repudiated the story of the burglary and said he concocted it to save the honor of his family. It was then he advanced the theory of suicide. After defendant had talked with Woolridge, who had been brought to the police station at the express desire of defendant to talk with him, defendant and Woolridge repeated to Capt. Kane the story defendant had told Woolridge when the two were together alone in Capt. Kane's office. According to the testimony of Kane, defendant said the child with which his wife was pregnant was not his and he at-

tributed her suicide to her shame. He stated he had said to his wife if she would submit to getting rid of the child by an abortion he would continue to live with her, and he said the thought of raising another man's child with his own almost drove him wild. When Capt. Kane expressed surprise at the defendant's mental condition over his wife's conduct after he had told her, as he said he had, that he had been out with a woman and gave his consent to her doing the same thing with men, defendant said he didn't believe she would do it. Capt. Kane testified, and in this he was corroborated by Parker, that subsequently defendant asked him to keep secret what he had said about his wife's unfaithfulness. Defendant testified in his own behalf and denied his guilt. He denied making any statement about his wife's unfaithfulness, but the testimony in the record of his statements and conduct following the death of his wife fully warranted the jury in regarding the defendant as unworthy of belief.

Many errors are assigned as grounds for a reversal of the judgment. Some of them are technical and not of sufficient importance, in our judgment, to justify a reference to or a discussion of them. Some of the errors are sufficient to deserve notice, but we regard them as not well assigned.

It is very strongly argued that the post-mortem was not a complete medico-legal post-mortem, and did not show, beyond a reasonable doubt, that the death did not result from other causes than chloroform. It is urged that there was only a superficial examination of the pancreas and glottis, which were not removed from the body, and no examination was made of the spinal cord, blood or urine. The small brain, or cerebellum, was not in the vessel containing the brain that was turned over to the doctors for examination. Doctors qualified by education and experience testified on behalf of the defendant that a complete medico-legal post-mortem would require the removal and micro-

scopic or chemical examination of the cerebellum, pancreas, glottis, spinal cord, blood and urine; that there were several causes of sudden death, among which they mentioned edema of the brain, rupture of a blood vessel in some part of the brain, edema of the larynx and acute hemorrhagic pancreatitis. Dr. Reinhardt testified that he examined the pancreas without removing it, and that he examined the glottis also with his fingers and found no evidence whatever of any disease or any condition that was unhealthy. We think the proof shows that the post-mortem was made with sufficient thoroughness to establish the fact that the death of Mrs. Cleminson resulted from chloroform and not from any of the other causes mentioned which may sometimes result in sudden death. Conceding that the post-mortem was not as thorough as it was possible to make, it was sufficiently thorough under the circumstances of the case. At the outset the doctor and others were told by defendant that his wife had been chloroformed. There was no indication of violence. None of the organs indicated any diseased or unhealthy condition or any condition from which death might have resulted. Defendant had given the information that chloroform had been used, and this was confirmed by the tests made by competent persons of the brain, stomach contents and lungs. In those parts, alone, was found a sufficient quantity of chloroform to sometimes produce death. But the amount found in those organs could not have been all the chloroform that was taken, for all the medical proof shows that the drug diffuses itself quickly throughout the entire body, and that to determine the exact amount of it in a body it would be necessary to grind up the entire body, bones and all, and thoroughly mix the mass before examination. It is true, the medical testimony shows that ordinarily it is difficult to anæsthetize a person while asleep, but it also shows it to be quite as difficult, or more so, for a person to anæsthetize himself by inhaling chloroform. The evidence ex-

cludes all reasonable hypothesis of death from any other cause than chloroform, and we think also excludes any reasonable hypothesis of it having been self-administered. No one was in the house during the evening and night preceding May 30 except defendant, his wife and two little boys.

We find no substantial error in the rulings of the court in the admission of expert testimony of medical witnesses. There was error, however, of a very grave and substantial character in other respects in the admission of testimony. At the request of counsel for the State, and over the objection and exception of counsel for defendant, the court called and examined as its witnesses, before the prosecution rested, Anna Kolb, George Brand and Clifton R. Woolridge. The record shows counsel for the prosecution gave as the reason for this request as to the witness Anna Kolb that the State did not wish to vouch for the truth of all she would testify to and desired the privilege of cross-examining her. The same reason was given as to the witness George Brand, and as to him it was further stated by counsel that he was in the employ of defendant, and the State did not know until after the trial had begun what he knew about the case. As to the witness Woolridge, the only statement made by counsel was that the State desired to cross-examine him. The names of Anna Kolb and Brand were not on the indictment but the name of Woolridge was.

In *Carle v. People*, 200 Ill. 494, which was a murder case, the court, at the request of counsel for the State, called a witness who was present at the time of the homicide. Counsel based the request upon the ground that the witness was present when the homicide was committed and ought to be called, but counsel stated he did not wish to vouch for the truth of his testimony. The witness was called to the stand and examined by the court and cross-examined by counsel for the prosecution and the defense.

The principal objection made by the defendant in that case appears to have been to the statement made by counsel for the prosecution as the reason why he desired the court to call the witness. This court said (p. 504): "Where the State's attorney knows that a witness was present at the scene of the killing, but for some reason, either because he has no confidence in the witness or for any other reason, he may doubt his veracity or integrity, he is not obliged to call such witness. In such case the court may call the witness and leave him open for cross-examination by either side. The State's attorney is invested with a certain discretion in the matter of calling witnesses for the State. Inasmuch as the court made it necessary for the State's attorney to announce the ground upon which he exercised his discretion, the statement that the People would not vouch for the testimony of the witness or guarantee its truth was not improper and was not a challenge of the truth or veracity of the witness."

The witnesses Anna Kolb and Brand did not come within the rule laid down in the above case. They were not eye-witnesses to the homicide and it was not pretended that they knew the facts about the death of Mrs. Cleminson. After a brief examination of Anna Kolb by the court, in which she stated she became acquainted with the defendant in August, 1907, and met him on different occasions after that, and that he treated her in May, 1909, for two weeks when she was sick in a hospital, the State was permitted to give her a most searching and extended cross-examination, much of which related to matters that could have no possible tendency to throw any light upon the guilt or innocence of the accused. The witness' testimony showed that there was for some time, at least, after she became acquainted with defendant, a degree of intimacy between them that is unusual between a married man and an unmarried woman, although there was no proof of criminal

intimacy between them. The cross-examination tended to degrade the witness, and on account of the friendly relations that had existed between her and defendant would necessarily prejudice him. The witness had been in the State's attorney's office on more than one occasion, had been questioned extensively about her relations with defendant, and the questions asked of and answers made by her were taken down by a stenographer. A great many that were read to her on cross-examination were irrelevant to the issue involved, and she was asked if the questions were not asked her and if she did not make the answers read. The witness testified she was engaged to be married to a man by the name of Fowler, and counsel for the State asked her if she was not present in the State's attorney's office when a woman claiming to be Fowler's wife was also present, and if certain questions were not asked of the woman claiming to be Mrs. Fowler about her marriage to Fowler and about their living together, and if she did not make certain answers thereto. Before the trial the witness was sent to the Lexington Hotel by the State's attorney's office and while there was under surveillance of detectives from that office. Counsel for the State asked her if Fowler did not stay all night at the hotel one night while she was there, and the witness answered that he did. For the purpose of impeaching the witness counsel was permitted to inquire of her if she did not make certain statements to a Mrs. Morey, Mrs. Raymond and Mr. Faupel. The witness denied making such statements, and in rebuttal counsel for the State was permitted to call the witnesses named and impeach the witness Anna Kolb by proving that she did make said statements. The witness was asked if she did not on one occasion tell Mrs. Morey she was then Mrs. Cleminson, and if she did not at another time tell her defendant had performed two abortions upon her. The witness denied making the statements and Mrs. Morey testi-

fied she did make them. Witness was also asked if she did not on one occasion tell Mrs. Raymond that defendant had performed two abortions on her. She denied it, and Mrs. Raymond was permitted to be called and testified that she did make the statements. George Brand, called by the court, testified, in answer to inquiries made by the court, that he was twenty-three years old and was a medical student; that he had known defendant for a year and at the time of the death of Mrs. Cleminson was an assistant in the office of Dr. Fisher and defendant; that he slept on a couch or davenport in the reception room of the office. On cross-examination he was permitted to testify that in May he sterilized a forceps, curette and dilater at defendant's request; that a lady came to the office and remained a short time and left with defendant in a taxicab. The witness testified he had a suit-case in the office, and that after this occurrence the suit-case had a notice on it, "Don't open." There is no pretense that the lady referred to by the witness was Anna Kolb. In many other respects, not necessary to refer to particularly, the cross-examination of these two witnesses, even if they had been called by the defense, went beyond all reasonable bounds. The practice of the court calling a witness at the request of either party in the trial of a criminal case should not be extended beyond the limits of the rule announced in *Carle v. People, supra*, and when the circumstances justify a court in calling a witness the cross-examination should be limited to the issues involved and kept within proper bounds.

The witness Woolridge was a friend of defendant and is the first person to whom defendant admitted the untruthfulness of the burglary story. His being called by the court and cross-examined by the State was not so flagrantly erroneous as was the case of the witnesses Anna Kolb and Brand. His testimony showed him to be friendly to defendant and apparently desirous of doing him as little harm as possible, and he pretended to be unable to remember any-

thing more than the merest outlines of the conversation he had with defendant when defendant admitted the burglary story was untrue and of the conversation Capt. Kane had with the defendant in his presence. If the prosecution had put him on the stand his apparent friendliness to defendant and frequent lapses of memory were such that the court would have been justified in permitting, and undoubtedly would have permitted, the prosecution to ask him leading questions. No greater harm resulted to defendant or benefit to the prosecution than would have been the case if Woolridge had been called to testify by the prosecution in the regular and approved method of trying criminal cases. The same cannot be said of calling the witnesses Anna Kolb and Brand by the court, allowing the cross-examination of them that was permitted and the impeachment of Anna Kolb upon the points mentioned. This was palpably erroneous, and would not only justify, but would require, the reversal of a judgment in any case if there was any doubt whatever about the guilt of the accused. Policeman Jernigan was permitted to testify that he and Lieutenant Culnane found in defendant's house a pocket-book in which was a "cundum," and it was permitted to be exhibited to the jury. This was palpable error, without any circumstance whatever to justify it. Criminal trials are instituted for the purpose of ascertaining whether the accused is guilty of the offense charged and the evidence should be confined to that issue. A defendant may be a bad and immoral man generally and his friends and associates may not be persons of admirable character but yet he may not be guilty of a particular crime charged. Whether defendant produced abortions on Anna Kolb and another woman could shed no possible light upon the issue whether on the night of May 29 he murdered his wife by administering to her chloroform. The same is true of the cross-examination of Anna Kolb for the purpose of showing that she was not an admirable character. It was not

improper for the prosecution to show the relations and feelings of the defendant toward his wife, and, if it were true, that he had an affinity to whom he was much attached, but the cross-examination of Anna Kolb was not directed to that purpose.

We also feel it our duty to say that the record shows one of counsel for the State addressed certain remarks to one of counsel for the defense that deserved severe rebuke from the court, but no rebuke was administered. Such conduct should not occur on any trial, and lawyers owe it to their profession and to the courts to avoid language and conduct the only effect of which is to destroy respect for the profession and for the courts.

The condition of this record is such that we have given its consideration much time and very serious thought. The competent evidence in the record, in our judgment, leaves no room for the slightest doubt of defendant's guilt. If this were not so, our duty to reverse this judgment would be most clear. The question then arises, in a case where the competent proof in the record shows the guilt of the accused beyond any doubt but where the record also shows errors of so grave a character as those before referred to,—errors that would require the reversal of a judgment in a case where the evidence left room for doubt of the guilt of the accused,—whether it is the duty of this court to reverse the judgment or to affirm it on the ground that the guilt of the defendant was so conclusively established by competent proof that the judgment should be affirmed notwithstanding the errors committed. After much deliberation we have concluded that as we cannot say that upon the competent evidence there might be a doubt as to defendant's guilt, we would not be justified in reversing the judgment on account of the errors committed. *Wallace v. People*, 159 Ill. 446; *Jennings v. People*, 189 id. 320; *Barber v. People*, 203 id. 543; *Wistrand v. People*, 218 id. 323.

Without further adverting to the testimony, which we have above set out in part, only, it is sufficient to say that we have read it all with great care, and cannot escape the conclusion that the verdict could not have been otherwise than guilty even if none of the errors referred to had been committed.

Complaint is made of the rulings of the court in giving instructions for the People and refusing instructions asked by the defense. One, at least, of the instructions given for the People was not strictly accurate, but we find no such error, either in giving or refusing instructions, as would justify a reversal of the case even if the proof were less conclusive than it is.

We have given the case the best consideration we are capable of. Some errors slighter in character than those referred to were undoubtedly committed during the progress of the trial, but this is almost unavoidable in the trial of a case lasting, as this one did, a month. Our conclusion is that the verdict was correct, and the judgment is affirmed.

Judgment affirmed.

COOKE and DUNN, JJ., and VICKERS, C. J., dissenting:

It is only under extraordinary circumstances that it becomes proper for the trial judge to call and examine a witness. It should never be done upon the mere request or suggestion of a party. If either party desires such action to be taken a showing should be made sufficient to convince the court that the ends of justice would be defeated if it were not done. In this case no such showing was made or attempted and the calling and examining of witnesses by the court was wholly unjustified. The cross-examination by the State's attorney of the witnesses so called was highly improper. While the evidence tending to prove the guilt of the defendant was strong, the error on the part of the court in calling and examining the three witnesses named, and in

permitting the State's attorney to cross-examine them in a manner grossly improper, is so grave and prejudicial that we are of the opinion the judgment should be reversed and the cause remanded for a new trial.

THE CITY OF GENESEO, Appellee, vs. HARRY E. BROWN, Appellant.—Same Appellee, vs. JOHN J. GUILD, Appellant.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. SPECIAL TAXATION—*cost need not be apportioned the same way as in case of special assessments.* In making improvements by special taxation it is not required that the cost shall be apportioned to the property benefited in the same manner that is required in case of a special assessment.

2. SAME—*the fact that property is not specially taxed in same proportion is not a legal objection.* If a special tax against a particular piece of property does not exceed the benefits to the property from the improvement its payment may be enforced, and the fact that other property receiving greater benefits is taxed no higher affords no valid objection to the ordinance or proceeding.

3. SAME—*what is not a sufficient description of drains.* The drains from catch-basins to the sewers are not sufficiently described in an ordinance where the only reference thereto is a provision for connection of the catch-basins "by the most direct route to public sewers, by means of thoroughly vitrified salt-glazed stoneware sewer pipe twelve (12) inches in diameter," there being no specification as to the length or depth of the drains or where the sewers are located.

4. SAME—*when indefinite description in ordinance is not aided by engineer's estimate.* Where an ordinance fails to describe the drains for connecting catch-basins with the sewers further than to specify "vitrified salt-glazed stoneware sewer pipe twelve (12) inches in diameter," such defect is not cured by an item in the engineer's estimate for "90 lineal feet 12-in. sewer tile drain at \$.50 per lineal foot, \$45," there being nothing, except by conjecture, to connect the two descriptions.

APPEAL from the County Court of Henry county; the Hon. ALBERT E. BERGLAND, Judge, presiding.

HARRY E. BROWN, *pro se* and for appellant John J. Guild.

HENRY WATERMAN, City Attorney, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court:

These are appeals from a judgment of the county court of Henry county confirming a special tax against appellants' property, levied for the purpose of improving and paving Exchange street, in the city of Geneseo, within certain limits specified in the ordinance. With the petition filed by appellee for levying the special tax were also filed the ordinance providing for the improvement by special taxation of contiguous property, a recommendation of the board of local improvements and an estimate of the cost of the work. A commissioner was appointed by the court to spread the tax. Said commissioner duly returned a tax roll against property abutting upon Exchange street where it was proposed to pave it, fixing the tax at the uniform rate of four dollars per front foot. Appellant Brown owned property with a frontage on said Exchange street of 135.4 feet, and the total special tax against it was \$541.60. Appellant Guild owned property having a frontage on said street of 193 feet, and his property was taxed \$772. A day was fixed by the court for hearing objections to confirmation of the tax and notice given to the property owners. Appellants filed numerous objections to the confirmation of the tax, and upon a hearing of the legal objections they were overruled as to the property involved in this record. The objections on the question of benefits were heard by a jury. The jury returned a verdict finding appellants' property was not specially taxed more than it would be benefited by the proposed improvement, and the court rendered judgment confirming the special tax roll. Both Brown and Guild have appealed from that judgment. As the same questions are involved in both appeals and the same brief has been filed

in both appeals the cases were consolidated and but one opinion will be filed.

Numerous grounds are urged for a reversal of the judgment. We have reached the conclusion that the judgment must be reversed for insufficiency of the ordinance in the respect hereinafter pointed out, and, with the exception of one other objection urged, the other questions raised are of a character not likely to arise again if another proceeding shall be begun to make the improvement by special taxation. We therefore will discuss but two objections raised on this record.

The ordinance provides for grading, draining, curbing and paving Exchange street from the east line of College avenue east to the east line of Russell avenue extended southerly to the right of way of the Chicago, Rock Island and Pacific Railway Company. The distance between the termini of the improvement is five blocks. The width of the pavement is not uniform. Certain portions of the street were required to be paved a width of 40 feet, and at other places varying widths down to 20 feet opposite the property of appellant Brown. All contiguous property was specially taxed at the rate of four dollars per front foot, and it is contended by appellants that for these reasons the ordinance is void, on the ground that it is unreasonable and oppressive. In making improvements by special taxation it is not required that the cost shall be apportioned to the property benefited in the same manner that is required in case of a special assessment. That a higher tax shall be levied against one piece of property that is benefited no more than another piece of property which is taxed a lower sum is not a valid objection in a special tax proceeding. If the special tax does not exceed the benefits to the property its payment may be enforced, and that other property receiving greater benefits is taxed no higher affords no legal objection to the validity of the ordinance or the proceeding thereunder for specially taxing property for local improvements.

Section 10 of the ordinance provides for the construction of six catch-basins, and section 11 provides for their connection "by the most direct route to public sewers, by means of thoroughly vitrified salt-glazed stoneware sewer pipe twelve (12) inches in diameter." The length and depth of these drains are not mentioned in the ordinance, and there is no reference to the sewers with which they were required to be connected from which it can be determined where the sewers are located or the length of the drains from the catch-basins to the sewers. We have quoted from the ordinance the only reference to or description of these drains. Where the sewers are located, and their depths, is nowhere referred to in the ordinance, and no other description of the drains is given than in the quotation made from section 11. We do not think this a sufficient description of the improvement to comply with the statute. The ordinance should specify the nature, character, locality and description of the proposed improvement. (*Sanger v. City of Chicago*, 169 Ill. 286; *Wetmore v. City of Chicago*, 206 id. 367.) In *Illinois Central Railroad Co. v. City of Effingham*, 172 Ill. 607, it was said: "The description of the improvement to be made is an essential element of an ordinance of this kind, and if there is a failure to comply with the statute, no judgment for a special tax can be rendered upon it. This ordinance provides for improving the street, among other things, by tiling it, but there is an entire failure to specify the nature, character, locality or description of that part of the improvement. There is no intimation whether the tile is to be farm tile, vitrified pipe, iron or wood, or what its size shall be. The ordinance does not specify its location, the depth to which it is to be laid, the number of lines of tile, or their inlets, outlets or connections. In *Otis v. City of Chicago*, 161 Ill. 199, an ordinance which provided for thirty-two lamp-posts and connections, but did not specify whether they were to be of wood or iron or what material, was held insufficient

to sustain a special assessment. In *Cass v. People*, 166 Ill. 126, an ordinance for laying water service-pipes, which failed to specify the dimensions of the pipes or to designate of what material they were to be made, was held insufficient, since no intelligent estimate of their cost could be made from the description in the ordinance. In *People v. Hurford*, 167 Ill. 226, an ordinance for laying a water service-pipe, which did not specify the material or dimensions so that an intelligent estimate could be made of the cost, was held insufficient to sustain a judgment. It is plain that this ordinance is equally defective, and that no committee could make an intelligent estimate of the cost of this material part of the improvement, as to which there is an entire want of any specifications." These drains were an essential part of the improvement and should have been described with such certainty that an intelligent estimate of the cost of them could have been made.

Appellee answers this objection by referring to the engineer's estimate, one item of which is, "90 lineal feet 12-in. sewer tile drain at \$.50 per lineal foot, \$45," and says this refers to the pipe for the drains from the catch-basins into the sewers and shows the amount to be too trifling to be given any importance. The engineer's estimate is quite as indefinite and uncertain as the ordinance itself. Whether the item referred to is intended for the drains from the catch-basins to the sewers can only be conjectured, and there is no reference to the depth of the drains nor to their length, unless it is to be inferred that the total length of the six drains is 90 feet. We are aware of no case where a description of an essential part of the work so indefinite as that of these drains from the catch-basins into the sewers has been sustained. In this respect we think the ordinance was invalid, and for that reason the judgments in both appeals must be reversed and the cause remanded.

Reversed and remanded.

CHARLES G. HUTCHINSON *et al.* Appellees, *vs.* DOUGLAS
W. HUTCHINSON *et al.* Appellants.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. PLEADING—*when probate of will is sufficiently averred.* A bill to contest a will which alleges that the instrument was exhibited in the probate court for probate "and an order was therein entered granting probate of the same," sufficiently alleges that the will was probated, even though the bill contains an allegation that the evidence was not heard in open court or by a judge of the court, as it is the existence, only, of the order which is material in a proceeding to contest the will.

2. SAME—*effect where an order allowing amendment and one allowing withdrawal are made at same term.* Where an order allowing an amendment to a bill to contest a will by striking out all reference to the order of probate and a subsequent order permitting the withdrawal of the amendment are made at the same term they are treated as having been made at the same time, and the court does not lose jurisdiction of the bill by reason of the amendment having been made.

3. RES JUDICATA—*separate maintenance decree is binding in a proceeding to contest defendant's will.* A separate maintenance decree establishing a common law marriage between the complainant and defendant, which has been affirmed by the Supreme Court, is conclusive of the fact of such marriage in a subsequent proceeding to contest the defendant's will.

4. WILLS—*children are not the sole objects of father's bounty.* Children are the natural objects of their father's bounty but not the only natural objects if he has other relatives, and the fact that his status as a father is fixed by a decree establishing a common law marriage does not deprive him of the right to dispose of his property by will to the exclusion of his children, if he sees fit.

5. SAME—*issue of undue influence, unsupported by evidence, is properly withdrawn from jury.* An issue of undue influence in a will contest case is properly withdrawn from the jury by the court where there is no evidence having any tendency to show that the will was procured by the influence of the defendants, or either of them, or that they had anything to do with its execution or any knowledge thereof.

6. SAME—*what is not evidence of an insane delusion.* The fact that the testator, after a separate maintenance decree establishing the existence of a common law marriage between him and a certain woman against his sworn testimony, adheres stubbornly to his

belief in the facts and refuses to admit the correctness of the decree though recognizing it as binding upon him, is not evidence of an insane delusion.

7. SAME—*an erroneous belief does not constitute insane delusion.* A belief which a rational person may entertain, however erroneous, is not an insane delusion, and it is reversible error to give instructions authorizing the jury to find a testator insane merely because he disagreed with a decree of court, entered against his sworn testimony, finding that a certain woman was his common law wife.

VICKERS, C. J., and FARMER, J., specially concurring.
HAND, J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

EDDY, HALEY & WETTEN, and JOHN T. MURRAY,
(CHARLES H. PEGLER, of counsel,) for appellants.

FRED A. BANGS, (GROVER C. NEIMEYER, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

Charles G. Hutchinson died on February 26, 1907, and an instrument executed on May 24, 1905, and purporting to be his will, was admitted to probate on April 12, 1907. A proceeding begun by his heirs in the circuit court of Cook county to set aside this probate was prosecuted to a decree granting the relief sought, and the executor and principal devisees have appealed.

The grounds alleged for the contest were the mental incapacity of the testator and undue influence exerted upon him to procure the execution of the will. The latter ground was withdrawn by the court from the consideration of the jury. Cross-errors have been assigned upon the record by the appellee and various questions have been argued by counsel for the respective parties, not all of which will require our determination.

A preliminary question arises upon the action of the court in denying the appellants' motion to dismiss the suit for want of jurisdiction. This motion was based on the claim that the original bill did not aver that the alleged will had ever been admitted to probate. This claim is an error, because the bill did aver that the instrument was exhibited in the probate court for probate "and an order was therein entered granting probate of the same." The subsequent allegations that the evidence was not heard in open court or by the judge of the court are immaterial. It is the existence of the order admitting the instrument to probate which is material. It is that order which is sought to be set aside. Whether it was properly entered upon the showing made, or was based upon evidence which was competent or incompetent, sufficient or insufficient, or upon any evidence whatever, is not the subject of inquiry in this proceeding. On April 29, 1908, after a special demurrer had been sustained to the bill, and more than a year after the probate of the instrument, appellees amended it by striking out the paragraph referring to the probate. This was a manifest inadvertence, and on May 6, at the same term, the appellees, by leave of the court, withdrew this amendment, leaving the bill as originally filed. Later the bill was amended by striking out the allegations of the bill to the effect that the evidence had not been taken in open court or by the judge of the court. It is insisted that the amendment of April 29, striking out all reference to the probate of the will, deprived the court of jurisdiction of the cause of action, and that the time within which the court could acquire jurisdiction having elapsed, the amendment of May 6 could not restore such jurisdiction. Whatever force this proposition might have if the term had elapsed, (and this we do not determine,) it has none in this instance. The term of court is regarded as a single day, to which all the proceedings of the term have reference. The order allowing the amendment and that allowing its withdrawal being

made at the same term are to be regarded as made at the same time and did not affect the jurisdiction of the court.

The decedent left four children, the appellees, Charles G. Hutchinson, Jennie C. Schutte, Daisy Grace Hutchinson and Violet Hutchinson, as his only heirs, and their mother, Jennie Curtis Hutchinson, his widow. His marriage was not ceremonial and in 1884 he deserted his wife and children. In 1898 he was sued by his wife for separate maintenance, and he denied that he was ever married to her. The cause was strenuously contested and resulted in a decree in favor of the wife, which was affirmed by the Appellate Court and by this court. (*Hutchinson v. Hutchinson*, 96 Ill. App. 52; 196 Ill. 432.) That decree established the marriage and is conclusive here. (1 Greenleaf on Evidence, sec. 525; *Burlen v. Shannon*, 3 Gray, 387.) After the decree the decedent continued to deny the existence of the marriage and never recognized his wife as bearing that relation to him, except in so far as the existence of the decree made such recognition compulsory. He lived as an unmarried man with one or another of his brothers, who are the chief beneficiaries under his will. He left an estate of several hundred thousand dollars. By his will he gave legacies of \$5000 each to Mary E. Tiffany and Josie Tobin and of \$2000 each to his daughters Grace and Violet. All the rest of his estate after the payment of his debts was devised to his three brothers, William A. Hutchinson, Chester M. Hutchinson and Douglas W. Hutchinson, the latter of whom was nominated as executor without bond. The devise to his two daughters and the only reference to his wife or children in the will are found in the second and third clauses, which are as follows:

"Second—Whilst the courts of the State of Illinois have decreed that one Jennie C. Hutchinson, who was always known to me as Jennie C. Curtis, is my common law wife, I know that in truth and in fact she is not and that no such common law marriage took place as was testified

to by her on the trial of the case of Jennie C. Hutchinson vs. Charles G. Hutchinson; and it is my express will that she shall have no share whatsoever in any of my estate other than that which she may obtain under and by virtue of the laws of the State of Illinois, and any of my property which may come to her after my death she will obtain solely because the laws of the State of Illinois give such property to her and not because I desire that she shall have the same.

"Third—I give and bequeath to the two youngest daughters of the said Jennie C. Hutchinson, namely, Grace Hutchinson and Violet Hutchinson, the sum of two thousand dollars (\$2000) each."

Appellees by the assignment of cross-errors have questioned the action of the court in withdrawing from the jury the issue of undue influence. This action was right. There is no evidence in the record which has any tendency to show that the execution of the instrument in question was procured by the undue influence of the appellants, or either of them, or that either of them had anything to do with or knowledge of its execution. At the time of its execution, May 24, 1905, James Maher, who had been Charles G. Hutchinson's attorney for a number of years, represented him in litigation which was then pending and had occasion to go to see him frequently at William A. Hutchinson's house, where testator was then living, about this litigation and his other business. At one of these times testator talked with Mr. Maher about writing his will and gave directions for that purpose. At his request Mr. Maher prepared a draft of the will, which was submitted to him, and afterward another draft, or more than one. The instructions in regard to the will came entirely from Charles G. Hutchinson. Nobody else made any suggestions or spoke to Mr. Maher about it or was present at any of his conferences with the testator. It was executed in the presence of Mr. Maher and two others who were asked by testator to sign it

as witnesses, and no other person was present, though Earl Dunning, who was an attendant upon the testator, was in the next room. There is no evidence that any suggestion was made to the testator by any of the appellants or any other person that he should make this will or any will. In 1899 and in 1900 the testator had made two wills, in each of which a substantially similar disposition of his estate was made to substantially the same persons, differing only in minor details. There is no indication that at the time of the execution of any of these wills the testator was under any sort of restraint or influence aside from his own wishes, or that he acted in any manner otherwise than as an entirely free agent.

Much testimony was introduced at the trial on the question of the testator's mental capacity. He was sixty years old when he died and the testimony covered more than forty years of his life. In 1865 or 1866 he came home from college in the east, and from that time for many years was employed in his father's bottling works in Chicago as a foreman and a book-keeper. About 1867 he began to have illicit relations with Jennie Curtis, which continued until 1875, when they were united by a common law marriage. The extent to which they openly lived together thereafter is uncertain, though three children were afterward born to them. They never lived together after 1884. He invented a stopper for bottles, which was patented in 1879. Soon after he organized a corporation in conjunction with his brother George and was actively engaged in the management of its business for many years. He was successful in business and accumulated a large amount of property. He had gonorrhea when he was about twenty years old and syphilis about twenty years before his death. He had a slight stroke of an apoplectic nature in 1895, which rendered him unconscious and partially paralyzed. He gradually recovered from this, though he did not fully recover the use of his hands and wrists, his limbs

remained stiff and his feet dragged. His eyes were crossed and for a time he saw double, but these troubles were afterward cured. He suffered a second and much more severe stroke of the same character in 1899. He experienced some loss of feeling in his body, arms and legs, loss of control of his legs, of his bladder and of his bowels, was weak in his hips, knees and ankles and could not readily lift his legs and advance them. The muscles about his shoulders and arms were wasted and the nerves degenerated. There is unanimity among the medical witnesses who testified on the subject that the cause of the trouble was syphilis. By some it is called syphilis of the brain and spine, by others sclerosis, arterial sclerosis, multiple sclerosis, post-lateral sclerosis, paralysis or paresis. Though stiff and uncertain, the testator did not lose his power of locomotion until confined to his bed shortly before his death. There is no contradiction as to the testator's physical condition. As a result of syphilis there was a degenerated condition of the spinal cord and of the posterior portion of the brain, and this condition was incurable.

Many witnesses, medical and non-medical, were examined whose knowledge of the testator covered the last forty years of his life. A very large majority of them expressed the opinion that he was of sound mind. The testimony of expert medical witnesses was also introduced by each party, whose opinions, given in answer to hypothetical questions, tended to support the views of the respective parties calling them. It is insisted by the appellees that the testator was afflicted with paresis,—a progressive disease, manifesting itself at first, perhaps, by a slight loss of memory, dropping of words or carelessness as to dress and person, these conditions becoming more marked as the disease progresses and affecting in an increasing degree the memory, judgment and mental functions, until, in an advanced stage of the disease, the mental powers of the victim are wholly destroyed. Syphilis is the principal, if not the sole, cause of paresis.

There is no evidence that the testator was of unsound mind prior to December, 1902. The fact that he was afflicted with syphilis and the extent to which the disease had progressed indicated that there was occasion to fear mental impairment in the future but not that such impairment then existed. At that time the testator went to Palmyra, Wisconsin, where he entered the Palmyra Springs Sanitarium as a patient. He remained there about three months, and during a part of that time he was delirious and irrational and was subject to frequent illusions and hallucinations. The evidence is conflicting as to whether this condition was caused by drugs administered to him or was due to another cause. The will in question was not executed until more than two years after the testator left the sanitarium, and in the meantime there had been no recurrence of the illusions or hallucinations. Since the decree must be reversed for error occurring on the trial, we shall not discuss the evidence or state it in detail or express any opinion as to its weight.

The appellees insisted on the trial, and argue here most earnestly, that the testator did not recognize his children as objects of his bounty and was therefore not of sound mind. It is insisted that he was under the insane delusion that he was not married to his wife and that the appellees were not his legitimate children. The jury were instructed that the decree in the separate maintenance case conclusively established that the testator was married to Jennie C. Hutchinson and that four children were born to them, and that if the jury found that the complainants were the children of the testator they would also find that they were natural objects of his bounty and affection. Thereupon the complainants requested, and the court gave also, the following instructions:

"The court instructs the jury that if you believe, from the evidence, that the complainants are the children and heirs of Charles G. Hutchinson, deceased, and that said

Charles G. Hutchinson, deceased, after August 8, 1900, and before May 25, 1905, stated that he was a single man, and during such time would not admit to his solicitor that the complainants were his children but denied that they were his children, and then told his solicitor, in substance, that he did not want them to ever get anything more than he allowed them in his will; and if the jury shall find, from the evidence, that the deceased, Charles G. Hutchinson, was prior to August 8, 1900, married, and that he knew on said date that he was married and that the complainants were his children and by him acknowledged as his children; and if the jury shall further believe, from the evidence, that some time between August 8, 1900, and May 24, 1905, Charles G. Hutchinson, deceased, thought and believed, without any cause or reason, that he was a single man and that the complainants, or any of them, were not his children, and that such belief would not and did not and could not yield to evidence or reason, and if they further believe, from the evidence, that said Charles G. Hutchinson, deceased, was governed and controlled by that belief, and that such belief was operating upon the mind of said Charles G. Hutchinson, deceased, at the time of the signing of the writing in evidence purporting to be the last will and testament of Charles G. Hutchinson, deceased, bearing date May 24, 1905, then the jury are instructed that they shall find that the writing in evidence purporting to be the last will and testament of Charles G. Hutchinson, deceased, bearing date May 24, 1905, is not the last will and testament of Charles G. Hutchinson, deceased."

"The court instructs the jury that if you believe, from the evidence, that complainants are the children and heirs of Charles G. Hutchinson, deceased, and that said Charles G. Hutchinson, deceased, after August 8, 1900, believed that he was a single man, and that such belief, if any, would not, did not and could not yield to evidence or reason, and that such belief caused the said Charles G. Hutchinson, at

the time of signing the paper purporting to be the will of May 24, 1905, to believe that the complainants, or any of them, were not his children, and that such belief as to his children, if any, had no other foundation whatsoever, then the jury shall find that the paper purporting to be the last will of Charles G. Hutchinson, deceased, dated May 24, 1905, is not his will."

These instructions required the jury to find against the validity of the will if they believed, from the evidence, that the testator, after August 8, 1900, believed, without any cause or reason, that he was a single man and that the complainants, or any of them, were not his children, and that such belief would not yield to evidence or reason but was operating upon his mind at the time of the signing of the supposed will. They are based upon the supposed existence of an insane delusion of the testator as to his marriage and his children and they do not have a sufficient basis in the evidence. The question of what constitutes an insane delusion rendering one incapable of making a will was considered by this court in the case of *Owen v. Crumbaugh*, 228 Ill. 380, and a number of definitions by various courts are there cited. In whatever words such definition may be expressed, a belief which a rational person may entertain, however erroneous, does not constitute an insane delusion. There is no basis in the evidence for contending that the testator was under a delusion as to any fact, except during the times of his temporary delirium at the Palmyra Springs Sanitarium. He knew that on August 8, 1900, a decree had been rendered declaring Jennie C. Hutchinson to be his wife and that four children were born of his marriage to her. He knew that the appellees were those children, and that in law Jennie C. Hutchinson was his wife and the appellees were his children. There is no evidence that he ever had any doubt of these things as matters of fact. The will itself recognizes the decree establishing the

status of his wife. He knew that in law she was entitled to, and would receive, the share of his estate given to a surviving wife by the laws of Illinois and that he could not prevent it. His legal obligation was the same as that of any other man to his wife and children. He had the legal right to dispose of his property to other persons than his children if he saw fit. They were natural objects of his bounty, though not the only natural objects thereof. His brothers were also natural objects of his bounty, and among them all the testator had the right to choose what claims he would recognize as most worthy. The will shows that he recognized the claims of two of his children. Under normal family relations he would naturally have provided for all his children with greater liberality. But his family relations were not normal, and the fact that he did not make his children the sole objects of his bounty, or the chief objects, does not tend to justify the conclusion that he was insane. He deserted his family in 1884. In 1898, when sued by his wife for separate maintenance, he denied the marriage, and it was only against his most determined opposition that it was established and against his testimony as a witness in denial of the facts constituting the marriage. The decree, and its affirmance by the appellate tribunals, did not, and could not be expected to, change his attitude towards the facts in the case. He had denied under oath the facts on which the decree was based, and while the force of the law compelled him to submit to the decree, it did not and could not compel him to change his belief as to the facts or his declaration as to his belief. The natural effect of the litigation might have been to include the children in the bitter hostility to the mother. During the pendency of that suit the testator made a will not materially different from the one now in controversy, and immediately after the decree another very similar. The evidence tends to show from the first an earnest design to

shake off absolutely, so far as possible, the claim of his wife and of her children, first by repudiating the marriage, if possible, and if not, then by disposing of his property away from them, and that he never departed from this intention but strictly adhered to it to the end. There was no change in his attitude toward his wife and children on or after August 8, 1900. The decree entered on that day made no difference in his mental attitude or mental condition. The fact that he adhered stubbornly to his belief in the facts after the court had found them against his sworn testimony was no evidence of an insane delusion. It is not evidence of insanity to disagree with the judgment of a court. The hypothesis contained in these instructions, that Charles G. Hutchinson believed, after August 8, 1900, that he was a single man and that the complainants, or any of them, were not his children, and that this belief would not and did not and could not yield to reason, has no foundation in the evidence. The instructions were misleading and it was error to give them.

The decree is reversed and the cause remanded.

Reversed and remanded.

VICKERS, C. J. and FARMER, J., specially concurring: We concur in the reversal of the decree below for the reason stated in the opinion of Mr. Justice Dunn, but in our opinion the evidence is wholly insufficient to sustain the verdict of the jury, and we think that the decree should be reversed upon this additional ground.

Mr. JUSTICE HAND, dissenting: In my opinion there is sufficient evidence in the record to sustain the decree and upon which to base the instructions referred to in the majority opinion, and I think the decree should be affirmed.

JOHN BENTLEY, Defendant in Error, *vs.* WILLIAM J. ROSS,
Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. **CONTRACTS**—*in reducing an oral contract to writing parties may elect to make changes.* Where a tunnel contractor and his superintendent reduce to writing an oral contract whereby the superintendent was to have one-third of the profits of the tunnel work, it is competent for them to elect to treat the amount to be recovered in a pending suit by the contractor, less the expense of such suit, as the amount in which the one-third interest exists, and in a subsequent suit the writing may be reformed so as to show the true docket number of the case referred to therein without reforming the writing so as to make it embody the original oral contract.

2. **SAME**—*when rights of parties are not fixed by an oral contract.* Where an oral contract between a contractor and his superintendent for one-third of the profits made on a tunnel contract is changed by the parties when reducing their agreement to writing, so as to apply to one-third of the amount to be recovered by the contractor in a pending suit against the city, the superintendent, in order to recover under the writing, need not prove that the tunnel contract was completed at a profit, nor is evidence admissible on the part of the contractor to show the contrary.

3. **MASTERS IN CHANCERY**—*what should be shown in master's claim for fees.* The claim of a master in chancery for fees should show the time he was necessarily employed in the examination of questions of law and fact and in preparing his report, and if objection is made by the party liable for such fees the master should be required by the court to support his claim by proof.

4. **SAME**—*when objection that master's fees were not itemized is not waived.* Where the master, having required pre-payment to him of fees before he would file his report, makes no formal claim for fees, the fact that the solicitor for the party liable makes an informal complaint to the court that the fees charged are unreasonable is not a waiver of the right to urge in a court of review that the fees were not itemized, as required by law.

5. **SAME**—*when specific objection to master's fees is not necessary.* If a party to a chancery suit objects to each provision of the decree that is adverse to his interests, it is not necessary that he make a specific objection to the master's charges for fees in order to raise the question in a court of review.

6. **SAME**—*in the absence of claim for fees court can only allow statutory fees.* In the absence of any claim by the master for an

allowance of fees it is error for the court to allow anything but the statutory fees to which he is entitled.

7. The court reviews the evidence in this case, and holds that it sustains the decree finding that there was an oral contract between the parties; that it was subsequently reduced to the form of a written assignment; that there was a mutual mistake in such assignment which was properly subject to correction; that the release produced by the defendant was a forgery, and that the complainant was entitled to recover on the assignment.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. W. PINCKNEY, Judge, presiding.

DAVID K. TONE, for plaintiff in error.

MANN & MILLER, for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

This suit was originally begun in the circuit court of Cook county by the filing of a bill for an injunction by John Bentley, the defendant in error, against the city of Chicago and certain of its officers, and William J. Ross and J. J. Ross, as partners, doing business under the firm name of Ross & Ross, to restrain the city and its said officers from paying, and Ross & Ross from collecting or receiving, any money in settlement of a certain suit then pending in said circuit court wherein William J. Ross and J. J. Ross, partners as aforesaid, were plaintiffs and the city of Chicago was defendant. A temporary injunction was issued in accordance with the prayer of the bill, and thereafter the bill was amended so as to include a prayer for an accounting and for a decree requiring the city of Chicago to pay to Bentley the amount found to be due him upon such accounting. Subsequently an amended and supplemental bill was filed, which substantially sets forth the facts claimed by Bentley to have been established upon the hearing of

the cause. This amended and supplemental bill alleged that in May, 1897, the firm of Ross & Ross, being then engaged in the construction of a certain water tunnel under a contract with the city of Chicago, employed Bentley as superintendent of the work and agreed to pay him for his services a monthly salary of \$150, and to give him, in addition thereto, one-third of the net profits derived from the construction of the water tunnel under the contract with the city; that Bentley continued as such superintendent under that agreement until some time in January, 1898, when the city declared a forfeiture of the contract and took possession of the water tunnel; that thereafter Ross & Ross brought an action of assumpsit in the circuit court of Cook county against the city to recover the amount claimed to be due them under the contract for work, labor and services rendered and materials furnished in the construction of the water tunnel, which suit was placed on the court docket as No. 180,302; that when the original bill was filed herein a verdict had been rendered in that suit against the city and in favor of Ross & Ross for \$35,000 and a motion for a new trial was pending, but the parties to the suit had then agreed upon a settlement thereof; that afterwards, in accordance with the terms of such settlement, the motion for a new trial was withdrawn and judgment was rendered upon the verdict against the city and in favor of Ross & Ross for \$35,000; that under the terms of his employment as superintendent Bentley had a one-third interest in the claim which was the subject matter of the suit docketed as No. 180,302, but that the agreement under which his interest was acquired had not, up to November 11, 1901, been reduced to writing; that during the forepart of November, 1901, and while the trial of said cause was in progress, Bentley became dissatisfied because the evidence of his interest in said claim and suit rested only in parol, and requested Ross & Ross to assign or transfer to him, in writing, his interest in the claim involved in the

suit then on trial, and that thereupon Ross & Ross executed and delivered to him the following written assignment:

"This memorandum of agreement, made this 11th day of November, A. D. 1901, between William J. Ross and J. J. Ross, composing the firm of Ross & Ross, contractors, of the city of Chicago, Cook county, Illinois, and John Bentley of the same place, witnesseth:

"Whereas, said Ross & Ross are the owners and holders of a claim against the city of Chicago for damages under a contract between said Ross & Ross and said city for the construction of the Sixty-eighth street water tunnel, which said claim now in suit pending in the circuit court of Cook county, wherein said Ross & Ross are plaintiffs and the said city of Chicago is defendant, being case General No. 180,301.

"Now, therefore, the said Ross & Ross, for and in consideration of the sum of one dollar and other good and valuable consideration by them, the said Ross & Ross, received of and from the said Bentley, have assigned, transferred and set over, and do hereby assign, transfer and set over, to said Bentley one-third of their said claim in said suit and one-third of any final judgment which may be entered in their favor in said suit and one-third of any settlement or compromise of said claim, meaning and intending hereby that after payment of all court costs, attorney's and stenographer's fees and expert witness' fees, also printing of briefs and other necessary expenses and obligations, deducting the same from the amount of the final judgment in said suit or settlement thereof, one-third of the balance remaining shall belong to and be the property of said Bentley, and he may receive and recover the same by suit or otherwise.

"Witness the hands and seals of the parties the day and year first above written.

Ross & Ross,
By W. J. Ross.

"Subscribed and sworn to before me this 21st day of November, 1901.

(Seal)

ELLSWORTH J. WALTON, *Notary Public.*"

The bill further alleged that when this assignment was made there was also pending in said circuit court a suit in trover, the docket number of which was 180,301, wherein Ross & Ross sought to recover from the city the value of certain machinery, tools and materials which it was claimed the city had converted to its use when it took possession of the water tunnel, and in which a judgment for \$5000 against the city was thereafter rendered by agree-

ment of the parties; that Bentley had no interest in this claim or suit; that the scrivener by whom the above assignment was drawn, through inadvertence or mistake, inserted in said instrument the number of the trover suit against the city, whereas it was intended by the parties to the assignment that it should relate to the suit in assumpsit; that Ross & Ross are insolvent and financially irresponsible; that they have refused to give Bentley an order on the city comptroller for the amount due him under said assignment and now fraudulently pretend that Bentley has no interest in the judgment for \$35,000, but that his interest, if any, under the said assignment is in the judgment for \$5000 which was rendered in the trover suit. The prayer of the amended and supplemental bill is, that the said error or mistake in the assignment be corrected and the instrument reformed so as to truly describe the suit intended by the parties to be therein described; that an accounting be had of the amount due Bentley under the assignment as reformed and corrected; that the city of Chicago be ordered and directed to pay Bentley the amount found due him upon such accounting, and for general relief.

Upon the hearing before the master it developed that J. J. Ross, who was formerly a member of the firm of Ross & Ross, had been dead for a number of years, but that William J. Ross, the surviving partner, had continued to transact business under the firm name, and that the contracts and suits between the city of Chicago and Ross & Ross were really contracts and suits between the city and William J. Ross. The contention of William J. Ross, as disclosed by his answer, by the evidence produced before the master and by his brief and argument in this court, is, that he never promised or agreed to give Bentley one-third of the net profits derived from the tunnel contract; that the assignment above set out was obtained from him without any consideration and solely by means of a threat made by one John McKechney that unless such assignment was

executed Bentley would testify for the city and against Ross in the assumpsit suit which was then on trial in the circuit court; that it was understood by McKechney, who obtained the assignment for Bentley, and by Ross, that the assignment was null and void because of the illegal consideration therefor and could not be enforced, and that it was agreed between them that McKechney should retain possession of the assignment and should never part with its possession; that it was also distinctly understood between McKechney and Ross when the latter executed the assignment, that it referred to the trover suit and not to the suit in assumpsit; that no net profits had been derived from the construction of the water tunnel, but that the work thereon under the contract with the city had been carried on at a heavy loss. Defendant Ross also claimed that on November 27, 1901, Bentley, in consideration of the execution and delivery to him of a promissory note for \$300 by William J. Ross, released and discharged Ross & Ross from all liability on account of the said assignment. Bentley denied that he executed this release and claimed that the signature thereto was a forgery.

The master to whom the cause was referred to take the evidence and report the same, together with his conclusions upon the law and facts, filed his report, in which, after an elaborate discussion of the evidence, all the material issues of fact were found in favor of the complainant, Bentley. The master also found that the net amount of the judgment in the assumpsit suit, after paying all expenses incurred therein by Ross, was \$16,490.33, of which Bentley was, under his assignment, entitled to \$5496.77, and recommended that a decree be entered in accordance with his findings and conclusions and with the prayer of the amended and supplemental bill. Upon this report the court entered a decree finding the facts as reported by the master, reforming and correcting the assignment by changing the figures 180,301 therein to 180,302, allowing \$1016.50

to the master for his services, and providing that \$550 thereof, which had been paid to the master by Bentley, be taxed as costs and re-paid to Bentley out of the moneys in the possession of the city of Chicago, and ordering the city of Chicago, in addition to the sums so taxed as costs, to pay to Bentley, out of the moneys in its possession, the sum of \$5496.77 due him under the assignment of November 11, 1901. William J. Ross prosecuted an appeal to the Appellate Court for the First District, where the decree of the circuit court was affirmed. The cause has been brought to this court by writ of *certiorari* granted upon the petition of William J. Ross.

It is first insisted on behalf of the plaintiff in error that the great weight of the evidence shows that plaintiff in error never promised to give defendant in error one-third of the net profits of the tunnel contract, but that the assignment to Bentley was executed without any lawful consideration. At the hearing before the master a large number of witnesses were examined and a great mass of testimony taken, consisting, when transcribed, of 1274 typewritten pages. The testimony on behalf of the respective parties was sharply conflicting and contradictory. To arrive at a correct determination of the questions involved it is necessary to determine in whose favor the evidence preponderates on four or five different questions. It would be impossible within the scope of this opinion to discuss and analyze all the testimony bearing upon these various questions, and we will not attempt to do that. The master found with the defendant in error on every material issue in the case. The findings of the master were adopted by the chancellor upon the hearing of exceptions to the report of the master and a decree was entered in accordance with those findings. This decree has been affirmed by the judgment of the Appellate Court. We have made a painstaking examination of the whole record and are of the opinion

that a clear preponderance of the evidence supports the findings of the master in every particular.

As to whether the contract of May, 1897, which the defendant in error contends was made between himself and William J. Ross, was entered into as claimed depends largely upon the testimony of the defendant in error and Ross, although other testimony was introduced by both parties as bearing upon the question. The master made two reports. By the first report, filed in October, 1904, he did not specifically find whether this oral contract had been made between the parties, consequently the matter was re-referred, with directions to "clearly find, from a consideration of all the evidence heretofore introduced before said master, that such an agreement between said Bentley and Ross was or was not made." The master thereupon filed a supplemental report, in which he found that in the month of May, 1897, the plaintiff in error agreed with the defendant in error that if the latter would continue to act as superintendent of the tunnel work he would give him \$150 a month and one-third of the net profits of the tunnel contract, and also reported that after a full consideration of all the evidence he was convinced that defendant in error's testimony was more reliable than that of plaintiff in error and that the evidence in his behalf was more credible than that offered on behalf of the plaintiff in error. This conclusion is amply supported by the evidence.

The facts proven so thoroughly discredit the testimony of plaintiff in error that we feel warranted in disregarding it altogether, except where it is corroborated by other credible evidence. The facts which tend to discredit his testimony are many, but it will only be necessary to refer to two circumstances to show the character of it.

During the progress of the trial of the assumpsit suit against the city, according to the testimony of defendant in error, he reminded plaintiff in error that their contract made in May, 1897, had never been reduced to writing and

requested that the same be done, as the defendant in error was about to leave Chicago for the State of California on account of the failing health of some member of his family. Plaintiff in error agreed that the contract should be reduced to writing and requested McKechney to draw up an assignment to defendant in error of one-third interest in the assumpsit suit, giving to McKechney the substance of what the assignment was to contain. Plaintiff in error was a member of the Order of Elks, and when McKechney informed him that he had the assignment prepared, plaintiff in error took him to a clubroom of the Elks lodge, where he inspected the assignment which McKechney had drawn. He was not satisfied with its terms, and, taking a sheet of the Elks stationery, he made a pencil memorandum of what he thought the assignment should contain. After reading the memorandum thus made by plaintiff in error, McKechney pointed out to him that it was substantially and in effect the same as the assignment which McKechney had prepared. After having McKechney interline one word in his draft of the assignment plaintiff in error agreed that they were substantially the same and executed the assignment drawn by McKechney, thus interlined. McKechney, by agreement of the parties, was to hold the original assignment until the suit had been finally determined. Upon leaving the Elks clubroom on this occasion, McKechney took with him, together with the assignment, this pencil memorandum which had been made by the plaintiff in error. Upon the hearing of this cause this pencil memorandum was produced by the defendant in error, and upon its presentation to plaintiff in error while on the witness stand he denied that he had ever seen it before or that it was in his handwriting. As the consideration for the giving of this assignment was one of the questions in dispute, the authenticity of this pencil memorandum became highly important. The proof shows conclusively that this memorandum is in the handwriting of the plaintiff in error, Ross,

and that it was drawn under the circumstances detailed by McKechney. A number of witnesses were produced by the defendant in error who were familiar with the handwriting of Ross, and they all testified that it was in his handwriting. Handwriting experts were called to the stand, who testified that from a comparison of the samples of the conceded handwriting of Ross this pencil memorandum was written by him. On the other hand, plaintiff in error produced witnesses who testified that they were acquainted with his handwriting and that this memorandum was not written by him, but these witnesses also testified, when samples of the conceded handwriting of Ross were presented to them, that those were not in his handwriting. The non-expert witnesses for defendant in error, on the other hand, recognized each specimen of handwriting conceded to be that of plaintiff in error unhesitatingly, and just as unhesitatingly declared every specimen which was not in the handwriting of Ross not to be his handwriting. Plaintiff in error also produced a handwriting expert who not only pronounced the memorandum not to be in the handwriting of plaintiff in error, but just as readily declared that certain conceded specimens of his handwriting were not written by him. The conclusion is inevitable that the plaintiff in error deliberately denied his own handwriting in order to escape the consequences of the effect of admitting that McKechney had drawn the assignment according to the instructions given him by the plaintiff in error.

Another instance of where the testimony of the plaintiff in error was wholly discredited on a material matter was in reference to the release which he claimed had been executed by defendant in error on the evening of the day the verdict was returned by the jury in the assumpsit suit. The assignment to the defendant in error of a one-third interest in that suit was dated November 11, 1901, and was executed about that time. The verdict was returned on November 27, 1901. On the hearing before the master the

plaintiff in error produced and offered in evidence a pretended release which he claimed had been executed by the defendant in error, and which was as follows:

"CHICAGO, November 27th, 1902.

"In consideration of Ross & Ross giving me a promissory note for three hundred dollars at three months, the same being a cancellation of all claims of every kind which I may have against Ross & Ross, the said promissory note being dated 27th of November, 1902.

JNO. BENTLEY.

Witnesses: W. J. Ross, Kenneth Ross."

The evidence shows that this release was dated November 27, 1902, but that at the time of the hearing the last figure "2" in the date line had become so obliterated by reason of a fold in the paper crossing that figure that it was impossible, without the aid of a magnifying glass, to determine whether it was a figure 1 or 2. In the body of the instrument, however, in describing the promissory note which is alleged to have been executed simultaneously with this release, the date is plainly 1902. The plaintiff in error and Kenneth Ross, his brother, who signed the release as a witness, both testified that they met Bentley at a saloon at the corner of Clark and Washington streets, in the city of Chicago, between 4:30 and 5 o'clock on the afternoon of November 27, 1901, and that shortly thereafter the three men went to the saloon of Al Kuhns, at 273 Dearborn street, where Bentley executed the release about six o'clock. Welbasky, a saloon-keeper, and Hicks, a bar-tender, testified that they also witnessed the execution of this release, all of the witnesses except Hicks testifying that Bentley was present and executed it. Hicks, at the time of the hearing, was not able to positively identify the defendant in error as the man who was there with plaintiff in error and his brother, Kenneth Ross. These witnesses testified that the release was drawn by plaintiff in error upon the polished surface of the saloon bar and was signed by the defendant in error and the two witnesses upon the bar. Upon cross-examination plaintiff in error, when asked specifically

as to how the release was signed by Kenneth Ross, testified that he believed that instead of signing it upon the bar Kenneth Ross placed the paper upon the rough glass partition between the bar and the cigar counter in the room, and thus signed it. A very cursory inspection of this paper discloses that the signature of Kenneth Ross was signed while the paper was lying upon some rough surface. The handwriting experts, who were later called, testified that it appeared to have been written upon some such surface as the cloth covering of a book. It was apparent that it was not upon such a surface as a polished bar would present. Kuhns was called later by the defendant in error and testified that the glass partition between the saloon bar and the cigar-stand in his saloon was composed of polished French mirror, and that there was no rough glass anywhere in his saloon except a panel in the front door. Handwriting experts testified that the pretended signature of defendant in error to this paper was not in his handwriting. Defendant in error himself testified that on the afternoon of November 27, 1901, he was working for the city, engaged in laying brick in a sewer between Thirty-ninth and Fifty-first streets, in the city of Chicago; that he worked overtime that day and quit work at about half-past five o'clock. The time-keeper for the city on this sewer work testified that he kept the time of Bentley on that day, and that he commenced work at eight o'clock in the morning on November 27, 1901, and quit work at 5:30 P. M. Two of defendant in error's fellow-workmen testified to the same facts, and testified further that they went home with defendant in error on the Illinois Central railway; that they boarded the train shortly before six o'clock, rode to Randolph street, where they alighted, and accompanied the defendant in error to his hotel, at the corner of Michigan and Wells streets, where they arrived at about a quarter past six o'clock. Effort was made on the part of defendant in error to secure the presence of the witness

Hicks after he had testified for plaintiff in error, but although subpoena was served upon him he did not respond but instead absconded from the city of Chicago. The master and the chancellor both found that this release was a forgery, and this finding is supported by a clear preponderance of the evidence.

Other facts shown might be cited which tend to discredit the testimony of the plaintiff in error, but we deem it unnecessary to refer but to these two, which concern very material features of the case.

Plaintiff in error insists that defendant in error is discredited by reason of the fact that his testimony in this cause differs from that given by him on the trial of the assumpsit suit of Ross & Ross against the city of Chicago, in which he was a witness. On the trial of the assumpsit suit defendant in error, who was called as a witness by the plaintiffs in that suit, was not asked, on his cross-examination, whether he had any interest in the event of the suit, although it is evident that he created the impression, without testifying directly to that fact, that he did not have an interest in the event of that suit. Upon his cross-examination he testified, as the records of that trial proven here disclose, that he was receiving from the plaintiff in error, as superintendent at the crib, a flat monthly salary, his board, and extra pay for all brick he should lay. He testified before the master in this cause that at that time he was receiving a flat monthly salary and his board, and nothing more. Defendant in error did not attempt to explain this discrepancy during his examination. This difference in the testimony of the defendant in error given in the assumpsit suit and given on the hearing of this cause is not sufficient to entirely discredit him, nor, assuming that the testimony on the trial in the assumpsit suit disclosed the true terms upon which defendant in error accepted the superintendency at the crib, is it sufficient to show that it is improbable that the contract was made which defendant

in error claimed was entered into in the latter part of May, 1897, and within a month after he had been employed as superintendent.

Plaintiff in error also insists that there is such a discrepancy between the allegations of the original bill herein, which was sworn to by the defendant in error, and the amended and supplemental bill, as to discredit defendant in error and to disclose that the alleged contract of May, 1897, was an afterthought. We cannot give our assent to this proposition. The bill was originally filed for the sole purpose of enjoining the payment of the full amount of the judgment to plaintiff in error. The allegations relied upon by plaintiff in error as showing a fatal discrepancy between that and the supplemental bill were, in substance, that prior to November 11, 1901, (the date of the execution of the assignment,) defendant in error had performed certain work, rendered certain services and laid out and expended for and on account of Ross & Ross a large sum of money, which said work, services and expenditures of money were all performed and laid out by him in and about the business and at the request of Ross & Ross. It is upon the fact that this bill was sworn to and that it did not contain any reference to the alleged contract of May, 1897, but instead contained the allegations just referred to, that plaintiff in error relies in his contention that the defendant in error's testimony about the alleged agreement for one-third of the net profits of the tunnel contract was an afterthought, invented by him after he had filed his original bill. When it is borne in mind that the bill was one for injunction, only, and not for the reformation of the assignment, the allegations of the original bill will not bear the interpretation placed upon them by the plaintiff in error or warrant the deductions made. Those allegations, while not as specific as they might have been, are such as might have been drafted by any careful lawyer acquainted with all the

facts, and they stated the facts with sufficient accuracy to warrant its being sworn to by the complainant.

Plaintiff in error does not deny the execution of the assignment which is sought to be corrected by this bill. He does claim, however, that he executed the assignment, not of his own free will, but as the result of threats made to him by McKechney that unless he did execute this assignment defendant in error would go over to the city and testify against him. At the time plaintiff in error claimed these threats were made defendant in error had already testified in his behalf and had been on the stand for the greater part of three days. The case was almost finished at the time of the execution of the assignment and the city had virtually closed its defense. Defendant in error testified that he requested plaintiff in error to reduce to writing their oral agreement made in May, 1897, and that he agreed to do so. McKechney testified to the same effect, and their testimony is, that thereupon the plaintiff in error requested McKechney to draft an assignment for him and gave him the substance of the matter to be contained in the assignment. A preponderance of the evidence shows that the assignment was executed for the purpose of reducing the prior oral agreement to writing, and not for the purpose of preventing Bentley from testifying on behalf of the city and against Ross & Ross.

Plaintiff in error contends, however, that if this assignment should be reformed, inasmuch as it was made to reduce to writing the prior oral agreement, it should be reformed so as to express that oral agreement and give defendant in error an interest in one-third of the net profits of the tunnel contract instead of an assignment of a one-third interest in the judgment obtained in the assumpsit suit. While it is true that as this assignment is drawn it does not state the prior oral agreement in the terms of that agreement and to that extent is not a reduction of that agreement to writing, it is apparent from all the circum-

stances surrounding this transaction that the parties elected to treat, and did treat, the amount involved in the assumpsit suit of Ross & Ross against the city as representing the net profits of the tunnel contract, or, at least, that they elected to substitute for the net profits of the tunnel contract whatever amount should be secured from the city as a result of that suit. That this is true is evidenced by the fact that the plaintiff in error himself stated to McKechney the matter which was to be contained in the assignment, and defendant in error accepted the assignment as satisfactory upon its execution. The existence of the pencil memorandum above referred to, drawn by plaintiff in error at the Elks clubroom, leaves no doubt as to the substance of the instructions given by the plaintiff in error to McKechney in reference to drafting the assignment. That pencil memorandum is as follows:

"We agree to pay John Bentley, one-third of any amount which may be due Ross & Ross after final judgment in the final court of resort. Certain obligations and undertakings have already been entered into by Ross & Ross, and it may be found necessary to enter into further obligations and undertakings to carry the suit through to a final settlement, and after payment of said obligations and undertakings the remaining amount shall be divided, one-third John Bentley, two-thirds Ross & Ross. And it is further agreed that this agreement shall be held in the custody of Mr. John McKechney, of the city of Chicago, as trustee, until a final adjustment is had."

Having elected to treat the amount involved in the assumpsit suit against the city as representing or standing in lieu of the net profits of the tunnel contract, plaintiff in error cannot now be heard to contend that this assignment should be reformed in that respect.

In this connection plaintiff in error insists that the bill should have alleged that the tunnel contract was completed at a profit, and that the burden was upon the defendant in error to show the amount of such profits before he was entitled to a reformation of the assignment, and also that the court erred in excluding evidence offered by the plaintiff

in error to the effect that he made no net profits out of the tunnel contract but said contract was completed at a great loss to him. For the reasons just above given the bill was not defective in the particulars pointed out, and no error was committed in excluding the offered testimony.

Plaintiff in error contends that the claim of the defendant in error is so inequitable that he should not be afforded relief in a court of chancery, and points out that by the decree of the circuit court defendant in error, in addition to his wages of \$150 a month and board, is awarded the sum of \$5496.77 for eight months' work. At the time of his employment as superintendent at the crib, in May, 1897, defendant in error was employed by plaintiff in error in the capacity of a foreman of bricklayers. According to the letters of plaintiff in error found in the record, the work was progressing in a very unsatisfactory manner. On May 4, 1897, plaintiff in error wrote defendant in error offering him the position of superintendent of the crib and putting him in full charge of the work, and explaining to him how unsatisfactorily the work had been progressing theretofore and expressing the hope and belief that the defendant in error would be able to get the work better organized and straighten out the difficulty. He offered him \$150 a month and his board, and suggested that this might lead to something better. On May 20 he again wrote defendant in error, telling him that he had not visited the crib since the defendant in error had been made superintendent, for the reason that he did not want it said that defendant in error had not handled the job wholly himself. In this letter he gave explicit directions as to how he would like to have the work carried on, and told him he would see him personally within a few days. Three or four days after receiving this letter the plaintiff in error visited defendant in error at the crib, at which time he complimented him upon having gotten everything working in good shape. On that occasion defendant in error informed plaintiff in error that

he did not desire to hold the position of superintendent any longer; that it meant a twenty-four hour day; that the responsibility was great, and that he could receive more wages by working at his trade. Thereupon the plaintiff in error urged him to continue, telling him he would give him \$150 a month toward his expenses and would give him one-third of the net profits of the work for his brains and labor. This proposition defendant in error testified he accepted. Under this arrangement he continued as superintendent at the crib until the following January, when the city took over the work. The consideration for this agreement was sufficient, and under the circumstances it cannot be said that it is so inequitable that a court of chancery will not afford relief.

It is urged that having in 1901 executed the release dated November 27, 1902, defendant in error is not entitled to the relief sought. As already pointed out, the evidence clearly discloses this release to be a forgery, and it is entitled to no weight or consideration whatever.

Plaintiff in error contends that at the time the assignment was executed by him the insertion of the number of the trover suit instead of the number of the assumpsit suit was deliberate, both on the part of himself and McKechney, and that it was done for the purpose of deceiving the defendant in error, who, according to the contention of the plaintiff in error, was by means of threats compelling him to execute this assignment to prevent the defendant in error from testifying against him. This contention is not supported by the evidence. It is clear from a preponderance of the testimony that the parties intended to make the assignment apply to the assumpsit suit and not to the trover suit, and that the number of the trover suit was inserted in the assignment by mistake and under such circumstances as entitles defendant in error to have the instrument corrected in that respect. The instrument itself, aside from the recital of the case number, bears conclusive evidence

that it relates to the matter involved in the assumpsit suit, for it recites that the interest assigned is in a claim against the city for damages under a contract for the construction of the water tunnel.

The five material questions of fact involved in this case,—(1) whether Ross agreed to give Bentley one-third of the net profits of the tunnel contract in consideration of Bentley continuing as superintendent; (2) whether the assignment in question was executed in order to reduce to writing the prior oral agreement; (3) whether the pencil memorandum of the assignment was written by W. J. Ross; (4) whether the general number of the trover suit was incorporated in said assignment instead of the general number of the assumpsit suit by a mistake of the parties; and (5) whether Bentley executed the release of November 27, 1901,—were all resolved by the master in chancery in favor of the defendant in error, and the decree of the circuit court on each of those questions is supported by a preponderance of the evidence.

Plaintiff in error objects to the fees allowed the master. The original report of the master was filed October 12, 1904. With this report was filed no statement or note whatever of the master's fees, the report in that respect being simply a memorandum following the signature of the master, as follows: "Master's fees, \$....., paid by" It appears from a conversation had between the solicitors for the parties at the time the decree was submitted to the court, which is preserved in the record by a certificate of evidence, that prior to the filing of his report the master had required the defendant in error to advance to him the sum of \$550 and the plaintiff in error to advance the sum of \$466.50 to apply on his fees. It does not appear that the master's fees had been determined by the court prior to their payment, but these amounts seem to have been arbitrarily fixed by the master and payment required before the report would be filed. By its de-

cree the court found that the sum of \$1016.50, being the total of the amounts paid by the respective parties, was a fair and reasonable compensation for the services rendered by the master, and that sum was allowed to the master. The decree further ordered that the sum of \$550 paid to the master by defendant in error be taxed as a part of the costs and be re-paid to the defendant in error out of the moneys then in the possession of the city of Chicago. At the time the decree was submitted for entry, solicitor for plaintiff in error objected to the amount of the master's fees as being unreasonable and excessive. The court being of the opinion that the fee was a reasonable and proper one, entered the decree accordingly. The plaintiff in error now urges that the master's fees were improperly allowed for the reason that they were not itemized as required by law. Defendant in error insists that inasmuch as the plaintiff in error only objected to the master's fees in the trial court for the reason that they were unreasonable and excessive, he cannot be heard now to object on the sole ground that they were not itemized, and inasmuch as the only ground urged in the Appellate Court was that the fees were not itemized, he cannot now be heard to say that they were unreasonable and excessive.

The master made no claim whatever for fees in connection with his report. The claim of the master for fees should show the time he was necessarily employed in the examination of questions of law and fact and in preparing his report, and if the parties who are called upon to pay the demands of the master object to the claim as presented he should be required to support his claim with proof, and the proof so produced should show the services rendered, the time actually and necessarily devoted to the work, and such other facts as would enable the court to intelligently determine the rights of the parties. (*Fitchburg Steam Engine Co. v. Potter*, 211 Ill. 138.) It would be impossible for the court to pass upon an objection that the fees

claimed were unreasonable and excessive without having before it an itemized statement of the fees claimed. An objection, in a case where the master presents his claim in a lump sum, on the ground that it is unreasonable and excessive would necessarily include an objection that the fees were not itemized. Under the facts in this case no formal objection can be considered to have been made to the fees of the master. The master had presented no claim for fees, and there was nothing before the court for decision or upon which a ruling was required. Counsel could not object to a mere announcement of the court as to what the decree should contain in the way of an allowance to the master. The solicitor for plaintiff in error was contending, in an informal way, to the court that the proposed fees were excessive. If that was to be treated as a formal objection it became the duty of the court to require the master to prove up his fees, which would necessarily include itemizing them. There is no force in the contention that by thus objecting to the chancellor that the fees proposed to be allowed were unreasonable and excessive, plaintiff in error thereby waived his right in the Appellate Court, and in this court, to say that the fees were not itemized as required by law. It is apparent that plaintiff in error objected to each provision of the decree which was adverse to his interests, and it was not necessary that he make specific objection to the master's charge for fees in order to raise the question in the Appellate Court and in this court. (*Wirzbicky v. Dranicki*, 235 Ill. 106; *Keuper v. Mette*, 239 id. 586.) As the master presented no claim for fees, it was error for the court to allow anything except the statutory fees. The testimony reported consisted of 1274 typewritten pages. At the statutory rate of fifteen cents per hundred words, estimating 275 words per page, this would amount to \$525.52.

The decree of the circuit court will be modified by striking out the provision allowing and taxing the master's fees,

and by inserting in said decree in lieu thereof the following language: "It is further ordered that the sum of \$525.52 be allowed the master in chancery for taking and reporting testimony at fifteen cents per hundred words, upon which sum shall be credited \$466.50 heretofore paid the master by the defendant. The balance, being \$59.02, will be taxed as costs." In all other respects the judgment of the Appellate Court and the decree of the circuit court will be affirmed. The costs in this court shall be paid, two-thirds by plaintiff in error and one-third by defendant in error.

Decree modified and affirmed.

JOHN F. DEVINE, Admr., Appellee, vs. THE FEDERAL LIFE
INSURANCE COMPANY, Appellant.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. SPECIAL INTERROGATORIES—*rule in determining whether special finding is inconsistent with general verdict.* In determining whether a special finding is so inconsistent with the general verdict that the latter must be held to be controlled by the former the Supreme Court cannot look at the evidence.

2. SAME—*inconsistency between the special finding and general verdict must be irreconcilable.* All reasonable presumptions will be indulged in favor of the general verdict while nothing is presumed in aid of the special findings, and to warrant the court in finding that the general verdict is not consistent with the special findings the inconsistency must be so irreconcilable as to be incapable of removal by any evidence admissible under the issues.

3. INSURANCE—*actual delivery of a policy not essential unless made so by the contract.* Unless made so by the contract for insurance an actual delivery of the policy of insurance to the insured is not essential to the validity of the contract, the rule in such case being that the policy becomes binding upon the insurer when signed and forwarded to the agent who took the application, to be delivered to the insured.

4. SAME—*premium on life insurance policy need not be paid in cash.* It is not essential to the validity of a life insurance policy

that the premium be paid in cash, and if so agreed upon between the insured and the agent the premium may be paid by the giving of a note.

5. *SAME—when default in payment of premium note does not render the policy void.* If a note is given by the insured for the premium on a life insurance policy under such an arrangement with the agent that the giving of the note constitutes an absolute payment, the fact that the insured had not paid the note at the time of his death does not render the policy void.

6. *SAME—when testimony of a solicitor is admissible.* Testimony of a person employed by an insurance agent to solicit insurance as to what representations he was authorized by the agent to make, and did, in fact, make, to a person whom he solicited, is admissible in an action on the policy as tending to show what arrangements were made between the agent and the insured, even though the witness was not a sub-agent of the insurance company and did not take the application himself but merely brought the agent and the insured together.

7. *SAME—when letter from president of insurance company to the plaintiff's attorney is admissible.* In an action to recover the amount of a life insurance policy, a letter from the president of the defendant company to the plaintiff's attorney stating that the company had the unpaid notes of the insured in its possession is properly admitted in evidence as showing the giving of the notes and as bearing upon the transaction between the insured and the agent, even though the defendant claims the policy was never in force because not delivered.

8. *SAME—when evidence that the agent was engaged in loaning money is admissible.* Where the person employed by an insurance agent to get business, and who solicited the insured and brought the agent and the insured together, testifies that he was authorized to represent, and did represent, to the insured that the agent would loan money on the policy and take notes for the loan, evidence that the agent was, in fact, engaged in loaning money is admissible, in connection with the fact that the insured executed and delivered notes for more than the amount of the premium.

9. *SAME—what amounts to a delivery of policy.* If an insurance company sends a life policy to its agent for delivery to the insured, and while the policy is still in the agent's hands an agreement is entered into between the agent and the insured whereby the agent is to retain the policy as security for a debt due him from the insured, there is a sufficient delivery of the policy.

10. *INSTRUCTIONS—party must point out defects in instruction.* An objection that an instruction does not state the law and that

it is misleading and not applicable to the facts will not be considered where no particular reason is pointed out why the instruction is so objectionable, no authorities are cited and no reference is made to the instruction in the argument.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. JOHN W. HOUSTON, Judge, presiding.

C. A. ATKINSON, and H. C. LEVINSON, for appellant.

CHARLES R. NAPIER, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

This was an action brought in the municipal court of the city of Chicago by John F. Devine, as administrator of the estate of Ralph W. Chance, deceased, against the Federal Life Insurance Company, to recover the sum of \$1000 alleged to be due on a policy of insurance claimed to have been issued by the company to Chance in his lifetime. The policy was dated May 4, 1907. Chance was struck and killed by a train of the Illinois Central Railroad Company on the morning of May 30, 1907. The defense to the action was that the policy had never been in force, as it had not been delivered to Chance and he had never paid any part of the first premium. The claim of the administrator was, that by an arrangement with Robert J. Jeffs, the general agent for the insurance company and the person who secured the application of Chance, the policy was delivered by the company to Jeffs for Chance, and it was held by Jeffs to secure the payment of three notes given by Chance to Jeffs, one for the amount of the first premium, one for \$50 and one for \$10.14. After the death of Chance, and on June 3, 1907, Jeffs, who had held the policy from the time of its issuance until that date, returned it to the insurance company, endorsed "not taken." The

jury found the issues for the plaintiff and returned a verdict for the full amount of the policy, \$1000. Judgment was rendered on this verdict and an appeal was taken to the Appellate Court for the First District, where the judgment of the municipal court was affirmed. The case is brought here by appeal upon a certificate of importance.

It is first contended that this judgment should be reversed for the reason that the general verdict is contrary to certain special findings of fact made by the jury. The jury were asked to answer twelve special interrogatories which were submitted to them. Of the twelve, three were so framed that no answer was required by reason of the answers given to certain others of the interrogatories. By the first interrogatory the jury were asked, "Was the policy sued on in this action delivered by the Federal Life Insurance Company to Ralph W. Chance during his lifetime?" To this the jury answered "no," and it is claimed that this finding is so inconsistent with the general verdict that it must be held to control the same and that the court should have entered judgment for the appellant. In determining whether a special finding is so inconsistent with the general verdict that the latter must be held to be controlled by the former we cannot look at the evidence. All reasonable presumptions will be entertained in favor of the general verdict while nothing will be presumed in aid of the special finding of fact. The inconsistency must be so irreconcilable as to be incapable of being removed by any evidence admissible under the issues. (*Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132.) Applying this rule, we find that there is no irreconcilable inconsistency between this special finding of fact and the general verdict. By its terms the application for a policy of insurance may be made a part of the policy itself. The application may or may not provide that the insurance shall take effect only upon the delivery of the policy to the insured. Unless expressly made so by the contract itself, an actual delivery

of a policy of insurance to the insured is not essential to the validity of the contract, and the rule under such circumstances is, that a policy becomes binding upon the insurer when signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured. Where an application is made for insurance there is no liability until the application is accepted, but the acceptance and issuing of the policy complete the contract. (*Rose v. Mutual Life Ins. Co.* 240 Ill. 45.) The finding of the jury that the policy had never been delivered to Chance was not the determination of any ultimate fact, or of a fact which had a controlling effect upon any ultimate fact. This finding is not so inconsistent with the general verdict that it should control, and the court did not err in ignoring this finding and entering judgment on the verdict.

It is urged that special findings numbered 3, 5, 6, 7, 8, 10 and 12 are also inconsistent with the general verdict. We do not so regard them. The third finding was that the deceased had not paid the premium on his policy in cash; the fifth, that he did execute a note for the amount of the premium; the sixth, that the note was executed on May 10, 1907, and delivered to Jeffs; the seventh, that the note was payable in installments of \$2.50 each, and that the first installment became due on May 29, 1907; the eighth, that Chance did not pay the installment falling due on May 29, 1907; the tenth, that none of the installments mentioned in said note were paid during the lifetime of Chance; and the twelfth, that the policy sued on contained the provision, "failure to pay any premium or note, or interest thereon, when due, will forfeit, without notice, the policy and all payments thereon, excepting as herein provided." It is not necessary that a premium on a policy of life insurance should be paid in cash. It can be paid by the giving of a note, or otherwise, if so agreed by the parties. That Chance executed a note and delivered it to

Jeffs, the agent, for the amount of the first year's premium, and that at the time of his death he was in default in the payment of this note, would not necessarily invalidate the insurance notwithstanding the provision found to have been contained in the policy, as Jeffs may have taken the note under such circumstances as would constitute an absolute payment of the premium. A further reason why these special findings do not show a forfeiture of the policy is, that by the twelfth finding the policy contained a clause providing for a forfeiture under certain circumstances, "excepting as herein provided." What the exceptions are is not shown by any of the special findings. For anything that is disclosed by these findings, the circumstances may have been such that they come within some exception contained in the policy which would prevent a forfeiture. As we view the special findings of the jury, and testing them by the rule above referred to, we do not regard any of them as inconsistent with the general verdict.

The parties on both sides have argued the facts elaborately, and the appellant insists that under the facts as disclosed the judgment of the Appellate Court should be reversed. All questions of fact involved have been finally determined by the judgment of the Appellate Court. We will review only the questions of law presented.

It is contended by appellant that the court erred in admitting the testimony of one Baker, a witness for appellee. In order to dispose of this objection it will be necessary to state some of the facts.

The appellant company had its general offices in the city of Chicago. Robert J. Jeffs was its general agent and had a written contract with the appellant. Jeffs was also president of a corporation known as the Consolidated Agencies Company, with offices in the city of Chicago. The witness Baker was in the employ of the Consolidated Agencies Company and worked under the immediate direction of Jeffs. Baker testified that while his employment

was nominally by the corporation and he gave his receipts for his monthly salary to the corporation, he was, in fact, working for Jeffs. Under his employment with the Consolidated Agencies Company Baker solicited insurance for Jeffs and brought together Jeffs and those who desired to make applications for insurance to appellant. It was Baker who first solicited Chance to apply to appellant for a policy of insurance. He testified that he made certain representations to Chance under the direction of Jeffs and that he stated to him only what Jeffs had instructed him to state. Those representations were, in substance, if Chance would take out a policy of insurance through Jeffs, that Jeffs would lend him money and would hold the policy of insurance as collateral or security until the notes given for the money loaned should be paid. Baker did not take the application of Chance but did succeed in bringing Jeffs and Chance together, and the application was taken by Jeffs and was sent by Jeffs to appellant. Baker further testified that, in accordance with the representations he had made to Chance under the direction of Jeffs, when the policy of insurance was issued by appellant Jeffs made a loan to Chance and Chance executed and delivered to Jeffs three promissory notes payable to Jeffs, one for the amount of one year's premium, being \$30.80, one for \$50 and one for \$10.14, and he explained that the latter note was composed of the following items: Five dollars, which was for a credit inspection fee, and \$5.14, being one year's interest in advance at the rate of six per cent on the \$50 note, the note for \$30.80 and the five-dollar inspection fee.

The basis of the objection to the admission of the testimony of Baker is, that in its contract with Jeffs appellant authorized Jeffs to hire such sub-agents, only, as should be approved by appellant, and that it had never approved of the employment of Baker as a sub-agent, and therefore should not be bound by any representations which Baker made to the decedent at the time the insurance was solic-

ited. The testimony of Baker was not admissible upon the theory that he was acting as a sub-agent of appellant and could therefore bind appellant by such representations as he should make in securing an application for a policy of insurance. Baker did not act as the sub-agent of appellant in this transaction. He did not secure the application of the deceased for the policy of insurance. He acted merely as the clerk or agent of Jeffs, making only such representations to Chance as he was authorized by Jeffs to make. Acting in this capacity he brought the deceased and Jeffs together and the application for the policy of insurance was made by the deceased, and when the policy was issued and delivered to Jeffs it was held by him in accordance with the arrangements made with Chance both by Jeffs personally and through the witness Baker. The testimony of this witness was admissible in order to show the nature of the contract between Jeffs and Chance whereby these three several notes were given to Jeffs, and the policy was held by him for Chance, and not for the appellant, instead of being delivered into the manual possession of Chance.

It is next objected that the court erred in admitting in evidence a letter from the president of the insurance company to the attorney for appellee, written in October, 1907. That letter was written in response to one received by the president of appellant and simply detailed that Chance had given a note to Mr. Jeffs for the amount of the premium, together with the other notes mentioned; that he had before his death only paid the note for \$10.14, had paid no part of either of the other two notes and was in default at the time of his death, and for that reason, and for the further reason that the policy had never been delivered to him, the company was not liable. The letter further stated that the two notes for \$50 and \$30.80, respectively, were in the possession of appellant. This letter was properly admitted in evidence. The admission of the appellant that the three notes testified to by Baker were actually given

by Chance and delivered to Jeffs was a proper fact to be proven in order to throw light upon the transaction between Jeffs and Chance at the time the policy was issued.

It is also objected that the court erred in admitting testimony showing that Jeffs, acting for himself or for the Consolidated Agencies Company, was engaged in the business of loaning money, for the reason that appellant had nothing to do with the methods of business of Jeffs or the Consolidated Agencies Company in the loaning of money. This evidence was properly admitted. While it might be said that appellant had nothing to do with the business of loaning money carried on by Jeffs or by the Consolidated Agencies Company, it was a matter proper to be shown, in connection with the testimony of Baker as to the nature of the transaction between Chance and Jeffs, whether Jeffs was engaged, generally, in that line of business. The evidence discloses, however, that under the contract with Jeffs appellant did have some connection with the money-loaning business carried on by Jeffs or the Consolidated Agencies Company. Attached to the contract between Jeffs and appellant, and expressly made a part thereof, is an instrument marked "Exhibit A," whereby Jeffs is appointed general agent of appellant, with authority to solicit and write applications for life insurance for appellant, "in connection with the loaning of money by said second party [Jeffs] in any State or territory where said company is admitted," whereby Jeffs is given the exclusive right to secure applications for insurance in connection with the loaning of money to applicants for insurance, with certain limitations, and whereby it is agreed that appellant shall acknowledge and consent to the written assignment of all commissions and renewals and other profits accruing, under the terms of the contract, to the Consolidated Agencies Company, and shall consider applications for insurance, under the terms of the contract, which are secured by Jeffs by the Consoli-

dated Agencies Company. This evidence was properly admitted.

Appellant objects to the giving of instructions numbered 1, 2 and 12. Instruction No. 1 was proper. It told the jury, in substance, that if they believed, from the evidence, that appellant sent the policy to its agent, Jeffs, for the purpose of delivery to Chance, and while the policy was still in the hands of Jeffs an agreement was entered into between Chance and Jeffs that the policy should be retained by Jeffs as security for indebtedness due him from Chance, such arrangement would, in law, amount to a delivery of the policy. Appellee might complain, with some reason, of the giving of this instruction, for neither the application nor the policy provides that the policy shall not become operative until delivered to the insured. Upon the theory that a delivery was necessary this instruction correctly states the law.

The objection to the second instruction is that it does not state the law, that it is misleading and is not applicable to the facts. No authorities are cited and no point made as to why this instruction does not state the law, is misleading or is not applicable to the facts. No reference whatever is made to the instruction in the argument. This objection will not be considered. As said in *Wickes v. Walden*, 228 Ill. 56: "We have repeatedly held that if counsel in their brief and argument do not point out wherein an instruction is erroneous or make a statement by which this court can know upon what basis or for what reason the trial court's action was erroneous, it is no part of our duty to search for these errors or enter upon an independent investigation of the court's own motion in order to find material on which to base a judgment of reversal."

Objection is made to the giving of the twelfth instruction. That instruction is, in substance, that under the provisions of the policy sued on, the non-payment, when due, of any installment of a note given by the insured for the

premium would render the policy void, and that if the jury found that any installment on the note given by the deceased was not paid, when due, to the defendant company or its agent, their verdict must be for the defendant, unless they believed, from the evidence, that the note was given to the agent of the defendant company and by him endorsed and delivered to some person or corporation other than the defendant company. The note had been endorsed by Jeffs to the Consolidated Agencies Company. Appellant urges two objections to the giving of this instruction: First, that it assumes that some agent of appellant had authority to endorse and deliver the note, and that there is no evidence showing any authority in Jeffs, or any other agent of appellant, to endorse and deliver the note given by Chance; and second, that under this instruction the jury might find the appellant liable even though the endorsement had been procured by fraud in which Chance participated. The written contract entered into between appellant and Jeffs, admitted without objection and not contradicted, is a complete answer to the first objection raised. As to the second objection, there was no attempt to prove that the endorsement was fraudulent or procured by any fraud in which Chance participated. The instruction is not subject to the criticisms made.

Appellant complains of other rulings by the trial court which it contends were erroneous. We have considered these alleged errors, but do not regard them of sufficient importance to require any discussion in this opinion.

We find no error in the record, and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE VICKERS took no part in the consideration or decision of this case.

JOSEPH ELLGUTH, Appellant, *vs.* ALBERT G. ELLGUTH
et al. Appellees.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. **PARTITION**—*a party must sue out writ of error if he desires whole case reviewed.* A party to a partition suit who is dissatisfied with the decree establishing and declaring the right, title and interests of the respective parties may not wait until the last order having reference to any of the proceedings is entered and then seek, by appeal, to have the whole case reviewed, as that can only be done by writ of error.

2. **APPEALS AND ERRORS**—*appeal from an order of distribution in partition does not bring up entire record.* A writ of error sued out after the final order of distribution in a partition case brings up the entire record, but an appeal taken from the order of distribution brings up only the order appealed from and so much of the record as is involved in that order.

3. **SAME**—*when a decree of sale in partition is not open to review.* A decree of sale in a partition proceeding is not open to review on appeal from a subsequent decree confirming the report of the master upon a re-sale of the premises and directing distribution, since the decree of sale is a final decree on that branch of the case, and must be appealed from directly or the record be brought up for review on writ of error.

4. **SAME**—*when an order confirming sale cannot be reviewed.* Where the purchaser at a re-sale of premises in a partition proceeding is not made a party to the proceeding or notified of objections to the report of the sale which ask that the sale be set aside, the decree of the court, in so far as it confirms the sale, is not open to review for errors not affecting the jurisdiction of the court, and the only errors which may be reviewed on appeal from the decree are those affecting appellant's interests in the proceeds of the sale.

5. **SAME**—*effect where decree of distribution refers to a former decree which has been rendered ineffective.* Where a decree confirming the report of a re-sale in partition directs distribution of the proceeds "according to the former orders and decrees of the court," but the only decree containing the directions for distribution has been rendered ineffective because the complainant, who purchased at the sale thereunder, failed to pay the amount of his bid, the second decree will be regarded, on appeal, as though it embodied the provisions of the first decree.

6. *SAME*—when the appellant is entitled to complain, on appeal, that dower interest was awarded in gross sum. A provision in a partition decree that the complainant's dower interest in certain premises "should be figured" on the valuation of the premises fixed by the commissioners does not amount to a finding that the complainant shall be awarded his dower interest in a gross sum, and if the only provision to that effect is in the decree confirming the re-sale and directing distribution of the proceeds, complainant, on appeal from the latter decree, may have such provision reviewed.

7. *DOWER*—court cannot compel complainant in partition to accept dower in gross sum. Under section 39 of the Dower act, if the commissioners in a partition proceeding report that complainant's dower cannot be assigned by metes and bounds, it is the duty of the court to decree that dower be assigned out of the rents, issues and profits of the premises, to be had and received by complainant as tenant in common with the owners of the premises, or to empanel a jury to fix the yearly value of such dower; and the court cannot compel complainant to accept dower in a gross sum.

8. *COSTS*—when an allowance of costs is improper. It is error for the court, in a partition case, to allow the solicitor's fees and stenographer's fees directly to the solicitor and the stenographer, and also to allow such fees as costs, without proof of their reasonableness, and the error may be availed of on appeal from the decree of distribution, where no other order or decree making such allowance was entered by the court.

9. *SAME*—costs in a partition proceeding should be assessed in proportion to interests of parties. The costs in a partition proceeding should be assessed against each of the parties in proportion to his interest.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

MATTHEW J. HUSS, for appellant.

FRANK FOSTER, and LYMAN M. PAINE, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellees filed their bill in the superior court of Cook county to set off the dower of Joseph Ellguth, appellant, in the premises known as 8700 Erie avenue and the undivided one-half of the premises known as 8700 Commercial avenue,

in the city of Chicago. Thereafter appellant filed his bill in the circuit court of Cook county for the partition of the premises known as 8700 Commercial avenue. These two suits were consolidated in the circuit court, and the superior court bill was ordered to stand as a cross-bill to the bill of appellant for partition. Appellant owned the undivided one-half of the premises known as 8700 Commercial avenue, had a dower interest in the other undivided one-half and a homestead in the whole, and also had a dower interest in the premises known as 8700 Erie avenue. A decree of partition was entered finding the interests of the parties in the real estate as stated and appointing commissioners to assign dower and homestead and make partition. The commissioners reported, finding the premises not susceptible of partition and appraising the premises at 8700 Commercial avenue at \$7000 and the premises at 8700 Erie avenue at \$5250. Appellant filed his written assent to the sale of the premises at 8700 Commercial avenue free of his dower and homestead. Decree followed, whereby the master was ordered to sell the premises at 8700 Commercial avenue free and clear of the dower and homestead rights and interests of appellant and that the dower interest of appellant in the premises at 8700 Erie avenue should be computed upon the valuation of \$5250, as fixed by the commissioners. Pursuant to this decree the master sold the premises at 8700 Commercial avenue to appellant for the sum of \$6050. Appellant having failed to pay to the master the sum bid for the premises the sale was set aside and the premises ordered re-sold, appellant to pay the expense of the re-sale and to be charged with any loss arising therefrom. Appellant prayed and perfected an appeal from this order to the Appellate Court for the First District, but that appeal was dismissed for failure of appellant to file a transcript of the record in time. Pursuant to the order for re-sale of the premises the same were sold by the master to one Stanley Boguszewski for the sum of \$4800. Appellant filed objections to

the report of this sale by the master and asked that the sale be set aside. The objections were overruled, report of the master approved and the master directed to execute and deliver deed to the purchaser. This decree also contained an order for payment of costs and for distribution of the proceeds of the sale. From this decree appellant prayed and was allowed an appeal to this court.

Appellant assigns error on the whole of this record and insists that this appeal brings up the whole record for review. Appellees contend, on the other hand, that the only matter presented for review by this appeal is the order of the court approving and confirming the sale by the master in chancery and directing the issuance of a deed and for distribution, and have confined their brief and argument to that question alone.

Appellant, in support of his contention that the whole record is here for review, cites the case of *Carter v. Penn*, 99 Ill. 390. That was a writ of error sued out of this court to bring up for review the record of the circuit court of St. Clair county. A writ of error sued out after the final order of distribution in a partition case brings up the entire record for review, but an appeal taken from the order of distribution does not bring up the entire record for review, but presents for the consideration of the court to which the appeal is taken, only the order appealed from and so much of the record as is involved in that order. (*Drummer Creek Drainage District v. Roth*, 244 Ill. 68.) A party dissatisfied with a decree in a partition suit which establishes and declares the right, title and interest of the respective parties may not wait until the last order having reference to any of the proceedings in the case is entered and by an appeal therefrom bring the whole case up for review. That can only be done by writ of error. If he is dissatisfied with the decree of the court as to the extent of his interests or as to any other matter affecting the title to the land and has a right to appeal, he is required to exer-

cise that right at that time, and he cannot, by appealing from a subsequent order, bring up for review a former decree which was final in its nature. *Rhodes v. Rhodes*, 172 Ill. 187; *Crowe v. Kennedy*, 224 id. 526; *Piper v. Piper*, 231 id. 75.

This appeal is from the decree confirming the master's report of sale and ordering distribution, and we are therefore necessarily limited to a consideration of the questions involved in the entry of that decree; and by reason of the fact that Stanley Boguszewski, the purchaser at the re-sale, was not made a party to the proceedings, or, so far as this record shows, notified of appellant's application to have the sale set aside, we are further limited to a consideration of questions which do not affect the validity or regularity of the sale to Boguszewski. If appellant desired to insist upon errors, not affecting the jurisdiction of the court, which could only be remedied by setting aside the sale, it was indispensable that Boguszewski, the purchaser, should be notified and made a party. (*Schulz v. Hasse*, 227 Ill. 156.) The action of the court in confirming the sale to Boguszewski must therefore be sustained.

Appellant is, however, entitled to a review of all alleged errors in the decree which affect his interests in the proceeds of sale. The decree with reference to the distribution of such proceeds is exceedingly vague and uncertain. It provides that the master shall "distribute the proceeds of said sale according to the former orders and decrees of this court." The only former order or decree in the cause relating to distribution was the decree which was entered November 11, 1909, upon the approval of the sale to appellant. That decree was, however, rendered ineffective by appellant's failure to pay to the master the amount of his bid, and the provisions relating to the distribution of the proceeds of that sale could not control the distribution of the proceeds derived from a subsequent sale of the premises. The action of the court in directing the master to

distribute the proceeds derived from the re-sale "according to the former orders and decrees of this court," must be regarded in the same manner as though the former decree had never been entered and the court had, instead of ordering distribution as provided in that decree, embodied the same provisions in the decree from which this appeal has been prosecuted as were contained in the decree of November 11, 1909.

The former decree, after finding that the sale to appellant had theretofore been made, reported and confirmed, and that the master had in his possession \$5050, being the proceeds of sale less an encumbrance of \$1000 on the premises sold, directed the master to pay, first, to David Eichberg, solicitor for complainants, \$32.75, taxed as costs of suit; second, to the commissioners (naming them) \$20 each; third, to Frank Foster, solicitor for defendants, \$3 appearance fee; fourth, to I. H. Weiner, reporter, \$30; fifth, to David Eichberg, solicitor for complainants, as solicitor's fee, \$400; sixth, that the master retain his fees, commissions and disbursements, amounting to \$166.50; seventh, to Joseph Ellguth, as and for his dower interest in premises known as No. 8700 Erie avenue, \$904; eighth, to Joseph Ellguth, as and for his dower interest in the one-half of the premises known as No. 8700 Commercial avenue, \$375; ninth, to Joseph Ellguth, as and for his homestead estate in the one-half of premises known as No. 8700 Commercial avenue, \$262.50; tenth, to Joseph Ellguth, the owner of one-half of the premises sold, \$1932.75; and eleventh, to the seven children of Mary Hermine Ellguth, deceased, (naming them,) each \$126.24. Appellant complains of the action of the court, first, in attempting by the decree of distribution to compel him to accept the sum of \$904 out of the proceeds derived from the sale of the premises at 8700 Commercial avenue in lieu of his dower interest in the premises at 8700 Erie avenue; second, in allowing solicitor's and stenographer's fees directly to the solicitor

and stenographer and without proof of the reasonableness of the allowances; and third, in assessing an unjust proportion of the costs against him.

With reference to the first complaint, the court, by the decree of partition, found that appellant was entitled to dower in the premises at 8700 Erie avenue and directed the commissioners appointed by that decree to assign such dower to him. The commissioners reported that the dower could not be assigned by metes and bounds, and fixed the value of the premises at \$5250. After ordering a sale of the premises at 8700 Commercial avenue, the court by the same decree again found that appellant had a dower interest in the premises at 8700 Erie avenue and that the commissioners had appraised the value of those premises at \$5250, and "that said Joseph Ellguth's dower interest therein should be figured on said valuation." This finding of the court that appellant's dower interest in the premises at 8700 Erie avenue "should be figured" on the valuation of the premises as fixed by the commissioners does not amount to an adjudication that appellant should be awarded a gross sum in lieu of such dower interest, and as no further order was made with reference thereto until the entry of the order of distribution, by which the master was directed to pay to appellant, out of the proceeds derived from the sale of the premises at 8700 Commercial avenue, the sum of \$904 as and for his dower interest in the premises at 8700 Erie avenue, appellant upon this appeal is in a position to complain of the action of the court in awarding him a gross sum in lieu of his dower in the premises at 8700 Erie avenue. Section 39 of the Dower act provides that "in all cases where the estate cannot be divided without great injury thereto, the dower may be assigned of the rents, issues and profits thereof, to be had and received by the person entitled thereto as tenant in common with the owners of the estate, or a jury may be empaneled to inquire of the yearly value of the dower therein, who shall assess

the same accordingly, and the court shall thereupon enter a decree that there be paid to such person as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of such dower, and the like sum on the same day of each year thereafter during his or her natural life." This statute is clear and unambiguous, and required the court in this case, when the commissioners reported that dower could not be assigned by metes and bounds, to decree that appellant's dower be assigned of the rents, issues and profits from the premises, to be had and received by him as tenant in common with the owners of the estate, or to empanel a jury to fix the yearly value of such dower. The statute confers no authority upon a court to compel the person entitled to dower to accept a gross sum in lieu thereof. (*Francisco v. Hendricks*, 28 Ill. 64.) The decree of distribution is therefore erroneous in directing the master to pay to appellant the sum of \$904 as and for his dower interest in the premises at 8700 Erie avenue.

Appellant also complains of the action of the court in allowing solicitor's and stenographer's fees directly to the solicitor and stenographer, and also in allowing such fees without proof of the reasonableness of the allowance. Both of these objections are well taken, (*McMullen v. Reynolds*, 209 Ill. 504,) and are properly presented upon appeal from the decree of distribution, as the court had not by any other order or decree made any allowance in favor of the solicitor or stenographer.

It is next contended that the court assessed an unjust proportion of the costs against appellant. The amount of the costs assessed against him is not stated in the decree and can only be determined from the distribution which the master was directed to make. It appears therefrom that the total costs directed to be paid out of the proceeds of sale amount to \$692.25, of which it is apparent \$592.25 has been assessed against appellant by directing the master to pay him \$592.25 less than the sum which he would have

received from the proceeds of sale, as the owner of one-half of the premises, had no costs been assessed against him. This was error. The costs should be assessed against each of the parties in proportion to his interest.

That portion of the decree confirming the master's report of sale is affirmed and that portion providing for distribution is reversed, and the cause is remanded to the circuit court with directions to charge Joseph Ellguth with the costs of the re-sale and the loss occasioned thereby, and to enter an order of distribution of the proceeds of that sale not inconsistent with the views herein expressed.

Reversed in part and remanded, with directions.

JAMES H. PROUTY, Admr., Appellant, vs. THE CITY OF CHICAGO, Appellee.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. PLEADING—*a party suing city for personal injury must aver that notice was given.* If an action against a city is for injuries to the person of the plaintiff the declaration must aver that the notice required by section 2 of the act of 1905, containing a statement of certain facts, was given to the city in the manner required by such statute; and failure to make the averment until after the Statute of Limitations has run is a good defense.

2. SAME—*averment of notice is unnecessary if suit is not one for a personal injury.* Neither under the title of the act of 1905, "concerning suits for personal injuries," nor section 1 of said act, can it be said that the giving of the notice provided for in section 2 is intended to apply to any actions against a city, town or village except actions for personal injury.

3. ACTIONS AND DEFENSES—*when action is for personal injury.* If a person suffers an injury to his person by the wrongful or negligent act of another, his right of action to recover damages exists independently of any statute and is an action for personal injury; and if he dies from some cause other than the injury, the right of action which he had for the injury survives and may be maintained by his personal representative.

4. SAME—*action by an administrator to recover damages for a wrongful death is statutory.* Where a person who is injured by the wrongful act or neglect of another dies as the result of his injuries before bringing suit, his personal representative has the right to bring an action for damages to recover the pecuniary loss to the widow and next of kin; but this right of action is statutory and not a survival of decedent's right of action for personal injury.

5. SAME—*statutory action by an administrator is not a suit for personal injury.* The right of action given by statute to the administrator of a person whose death has resulted from the wrongful act or neglect of another, to recover the pecuniary loss to the widow and next of kin, is not an action for a personal injury. (*Crane v. C. & W. I. R. R. Co.* 233 Ill. 259, and *Mooney v. City of Chicago*, 239 id. 414, distinguished.)

6. MUNICIPAL CORPORATIONS—*act of 1905, concerning notice to city of a personal injury, does not apply to suit by administrator.* The act of 1905, requiring a person intending to bring an action against a city for personal injury to file a notice or statement with the city attorney, containing certain specified matters, does not apply to the statutory action by an administrator of a person whose death has resulted from the city's negligence, to recover the pecuniary damages sustained by the widow and next of kin.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding.

GEORGE E. GORMAN, JAMES A. BRADY, and BRADY, BARNUM & RUTLEDGE, (A. S. LANGILLE, and DANIEL BELASCO, of counsel,) for appellant:

"A suit at law for personal injury" is not the same cause of action as a suit brought in the name of an administrator for "compensation for causing death by wrongful act," and therefore the latter is not affected by section 2 of the Cities and Villages act of 1905. Stat. 9 and 10 Victoria, chap. 93, enacted in 1846; *Blake v. Railway Co.* 10 L. & E. 439; *Whitford v. Railroad Co.* 23 N. Y. 465; *Railroad Co. v. Larussi*, 161 Fed. Rep. 70; *Brown v. Salt Lake City*, 93 Pac. Rep. 570; *Maylone v. St. Paul*, 40

Minn. 406; *Clark v. Manchester*, 62 N. H. 577; *McKeigue v. Janesville*, 68 Wis. 40; *Perkins v. Oxford*, 66 Me. 545; *Orth v. Belgrade*, 91 N. W. Rep. 843.

The injury suffered by the widow and next of kin of a deceased in case of death by wrongful act is not such a personal injury as to make section 2 of the Cities and Villages act of 1905 apply to Lord Campbell's act. See authorities *supra*.

EDWARD J. BRUNDAGE, Corporation Counsel, and CLYDE L. DAY, City Attorney, (EDWARD C. FITCH, of counsel, for appellee:

An action brought under the provisions of sections 1 and 2 of chapter 70 of Hurd's Statutes of 1909 is an action to recover damages on account of personal injuries. *Holton v. Daly*, 106 Ill. 131; *Crane v. Railroad Co.* 233 id. 259; *Railroad Co. v. Ackley*, 171 id. 109; *Devine v. Healy*, 241 id. 34; *Railroad Co. v. O'Connor*, 119 id. 586; *Titman v. Mayor*, 57 Hun, 469; *Mooney v. Chicago*, 239 Ill. 41; *Crapo v. Syracuse*, 183 N. Y. 395; *Carden v. Railroad Co.* 19 Ky. L. 132; *Railway Co. v. Kelly*, 20 id. 1238; *Lyon v. Railroad Co.* 107 Fed. Rep. 386; *Whaley v. Catlett*, 103 Tenn. 347.

An action brought under the provisions of sections 1 and 2 of chapter 70 of Hurd's Statutes of 1909, being an action on account of personal injuries, is within the provisions of sections 2 and 3 of the act of 1905, entitled "An act concerning suits at law for personal injuries and against cities, villages and towns." *Crapo v. Syracuse*, 183 N. Y. 395; *Titman v. Mayor*, 57 Hun, 469.

The second section of the act of 1905 requires that the notice be served by the "person who is about to bring" the suit, either by himself, his agent or attorney. The person sustaining the bodily injury is not required to serve notice, or cause it to be served, unless he is the person about to bring the suit.

The term "personal injury," or "injury to the person," is broad enough to include all actions of tort founded on injuries to the body of any one in such relations to the plaintiff that the injury causes him damage; and a physical injury to a wife, resulting in loss of her services, is an injury to the person of the husband. *Mulvey v. Boston*, 197 Mass. 178; *Maxson v. Railroad Co.* 112 N. Y. 559; *Kujek v. Goldman*, 29 N. Y. Supp. 294.

The term "personal injury" means not only a physical injury to the person, but also an injury to his absolute or relative personal rights, and includes libel and slander. *Johnson v. Bradstreet Co.* 87 Ga. 79.

An injury to the person which results in death is a personal injury. *New v. Railway Co.* 116 Ga. 147.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On November 14, 1906, appellant, James H. Prouty, administrator of the estate of Michael J. Doyle, deceased, brought this action on the case in the superior court of Cook county against the appellee, the city of Chicago, and on November 21, 1906, filed his declaration, alleging in seven counts wrongful acts of the defendant committed on October 27, 1906, causing the death of Doyle on the same day and depriving the widow and next of kin of their means of support. A plea of the general issue to the declaration was filed. There was no averment in any of the counts that notice had been given to the city in accordance with section 2 of the act entitled "An act concerning suits at law for personal injuries and against cities, villages and towns," in force July 1, 1905. (Laws of 1905, p. 111.) On April 17, 1908, by leave of court, plaintiff filed seven additional counts, which were identical with the original counts except that each contained an averment of service of such notice on November 13, 1906. To these additional

counts the defendant filed pleas of the general issue and the Statute of Limitations. The plaintiff demurred to the plea of the Statute of Limitations and the demurrer was overruled. The plaintiff elected to stand by his demurrer and the suit was dismissed at his costs. He appealed from the judgment to the Appellate Court for the First District and the cause was heard in the branch of that court, which affirmed the judgment and granted a certificate of importance and an appeal to this court.

If this suit is for a personal injury, the giving of the notice specified in the second section of the act of 1905 was a fact which it was necessary for the plaintiff to prove in order to maintain the action, and therefore one of the facts which he was bound to aver in his declaration. (*Erford v. City of Peoria*, 229 Ill. 546; *Walters v. City of Ottawa*, 240 id. 259.) The averment was first made in the additional counts, more than one year after the date on which it was alleged that Doyle died, and if the averment was a necessary one the Statute of Limitations was a good plea and the court was right in overruling the demurrer, but if the suit is not for a personal injury the court erred.

One who suffers an injury to his person as a consequence of the wrongful or negligent act of another has a right of action for the damages resulting from such injury without the aid of any statute but by a right which existed at common law. His action is for the personal injury, and he may recover for pain and suffering, physical and mental, for expenses of medical treatment and attendance, and permanent effects upon his person reasonably certain to result. If he dies from some other cause than the injury the action for the injury to his person survives to his personal representative, who may recover damages for the personal injury. (*Savage v. Chicago and Joliet Electric Railway Co.* 238 Ill. 392; *Holton v. Daly*, 106 id. 131.) In the common understanding and legal meaning such a suit is for a personal injury. That is also true of any suit for injury to

a living person brought by one sustaining such relations to the injured person that the plaintiff suffered damages as a consequence of the injury. If an injured person survives and brings a suit for the personal injury and afterward dies from its effects the action does not survive but abates, and a different right of action is substituted based upon a statute. That is the right of personal representatives of a deceased person to bring a suit and recover the pecuniary injuries to the widow and next of kin occasioned by his death, and that right exists in this State by virtue of the act of 1853, entitled "An act requiring compensation for causing death from wrongful act, neglect or default." (Laws of 1853, p. 97.) That act does not, in its language or in substance, create a cause of action for a personal injury. It provides that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages resulting to the widow and next of kin from his death. We are asked to say that a suit of that kind is the same as a suit by a living person for damages sustained on account of an injury to his person, but it seems to us that it would require a perversion and change of language to reach such a conclusion.

By the general Statute of Limitations actions for damages on account of an injury to a person must be commenced within two years next after the cause of action accrued, but the statutory action is barred at the expiration of one year from the death of the person for which it may be brought. The title of the act requiring notice has already been given, and it relates only to suits at law for personal injuries. The first section provides that no suit shall be brought by any person for an injury to his person

unless such suit or action be commenced within one year from the time such injury was received or the cause of action accrued. It would be impossible to include the statutory action in that section, both because its language is limited to suits brought by any person for an injury to his person, but also because the limitation of the statutory action was already one year. Section 2 provides for the notice, and counsel contend that it includes a class of cases not mentioned either in section 1 or in the title. That would not be the natural construction of the act unless there is specific language in section 2 requiring such a conclusion. The notice is to be given within six months from the date of the injury or when the cause of action accrued. Counsel think the section may apply by requiring notice within six months after the cause of action accrued, but that is precisely the same language used in section 1, which limits the right to bring suit to one year from the time the injury was received or the cause of action accrued. There is no change in the language which would justify an enlargement of the meaning. The Appellate Court adopted the view of counsel that an administrator must give notice within six months after his appointment, citing *Crapo v. City of Syracuse*, 183 N. Y. 395, as authority for so holding. In that case the majority of the court were of the opinion that the cause of action accrued upon the appointment of the administratrix sixteen months after the death, but our statute does not treat the action as accruing on the appointment of an administrator but bars it in one year after the death. To adopt the conclusion of the Appellate Court we would have to say that an administrator might be appointed near the end of the limitation fixed for bringing the suit, but the legislature intended to give him six months after his appointment, extending after the action was barred, to give the notice. The section requiring notice imposes the duty upon the person who is about to bring the suit, which must necessarily be the administrator, and

to say that he may give notice within six months after his appointment would involve an absurdity. In the *Crapo* case the majority of the court were of the opinion that the action was for personal injuries, but the question was immaterial in the case, as the court stated on the motion for a re-argument. It was then said that the majority differed among themselves whether the action was for a personal injury, but the question was immaterial so long as it was held that the cause of action did not accrue until the appointment of the administratrix. (*Crapo v. City of Syracuse*, 76 N. E. Rep. 1092.) The judges who thought the action was for a personal injury were not in accord with the courts generally, which hold that a statute requiring notice of a personal injury does not include claims for damages suffered by third persons by reason of death. *McKeigue v. City of Janesville*, 68 Wis. 50; *Clark v. Manchester*, 62 N. H. 577; *Maylone v. City of St. Paul*, 40 Minn. 406; *Perkins v. Oxford*, 66 Me. 545; *Brown v. Salt Lake City*, 93 Pac. Rep. 570.

It is urged that it would be as beneficial to a city to have notice in a case where an injury results in death as where the action is brought by the person injured for the injury to his person. Perhaps it would be a benefit to any defendant charged with a wrongful act, neglect or default causing death to have timely notice of the facts mentioned in the statute, but whether provision shall be made for such notice is for the legislature, and it is not for the courts to impose conditions not required by the law upon persons who are given a right of action for a wrong.

The theory that the legislature intended to include actions for damages for the benefit of third persons, on account of death, in the category of suits for personal injuries, is sought to be sustained by decisions that the wrongful act, neglect or default constitutes the cause of action in a suit brought by an administrator. *Crane v. Chicago and Western Indiana Railroad Co.* 233 Ill. 259, and *Mooney v.*

City of Chicago, 239 id. 414, are cited to show that the statutory action is for personal injuries. In the *Crane case* the question was whether the statutory provision that no action should be brought to recover damages for a death occurring outside of the State referred to the death alone, or to both the wrongful act, neglect or default and the death. It was held to include both, but it was not held that a declaration which merely alleged the wrongful act, neglect or default, and did not aver the death, would state a good cause of action. The wrongful act, neglect or default constitutes a cause of action in the sense that it is an interference with a right of the plaintiff or a breach of duty which gives the plaintiff ground for complaint and renders the defendant liable for any damage that may result. If death is concurrent with the act, neglect or default, no one stating the fact would think of saying that the person was injured, and death is never described as an injury to the person. In the *Mooney case* it was held that where the wrongful act, neglect or default did not result in instant death the administrator could not maintain an action unless the deceased had a right to sue at the time of his death, and if he had released defendant the statute would not authorize the administrator to sue. We find no reason for saying that notice is required by section 2 of the act in question where an action is by an administrator under the statute.

The judgments of the Appellate Court and superior court are reversed and the cause is remanded to the superior court, with directions to sustain the demurrer to the plea of the Statute of Limitations.

Reversed and remanded, with directions.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOHN GUKOUSKI *et al.* Plaintiffs in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. CRIMINAL LAW—a motion for separate trial is addressed to sound discretion of court. A motion for the separate trial of certain defendants in a criminal case is addressed to the sound discretion of the trial court, and a denial of the motion will not be reviewed unless it is clear that the trial court abused its discretion.

2. SAME—value of confessions as evidence depends upon circumstances under which they were made. The value of confessions as evidence depends upon the circumstances under which they were made, and it is for the jury to say, in view of such circumstances, what weight they are entitled to.

3. SAME—when confessions are admissible. Oral statements in a foreign language, written down in English by one police officer in the presence of another, both of whom were fellow-countrymen and understood the language of the declarants, who signed the confession after it had been translated to them, sentence by sentence, are admissible in evidence where the declarants do not deny that the statements were voluntarily made, although they claim they were not correctly transcribed or translated to them.

4. SAME—jury must decide whether confessions or testimony are true. Where the testimony of defendants in a criminal case is in conflict with their confessions and affidavits made before the trial, it is for the jury to determine which to believe.

5. SAME—when co-conspirators are guilty of murder. Persons who conspire together to do an unlawful act, which includes an assault upon the person of another, must be presumed to have intended to use whatever means may appear to be necessary to overcome such person's resistance in order to enable them to carry out their design, and if one of their number kills such person in the assault upon him all the conspirators are guilty of murder.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. RICHARD S. TUTHILL, Judge, presiding.

WILLIAM PRENTISS, for plaintiffs in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and JOEL C. FITCH, (ROBERT E. CROWE, of counsel,) for the People.

Mr. JUSTICE FARMER delivered the opinion of the court:

On May 5, 1909, between three and four o'clock in the morning, Henry Tietlebaum was fatally shot near a grocery store at 756 West Seventeenth street, in the city of Chicago. Tietlebaum was a bakery-wagon driver employed by Joseph Blonski, a baker doing business at 642 Milwaukee avenue. At that time there was a strike going on among the bakers employed by Blonski. No one other than the parties charged with the shooting saw it, but as soon as the shots were fired a crowd gathered and Tietlebaum was picked up from the sidewalk where he had fallen and taken to a hospital, where he died a short time afterwards. A hat found in the vicinity where the shooting was done led to the arrest of Bladislaus Nogawischi the same day, and from information obtained from him, John Gukouski and Alexander Krolkowski were at once arrested, and about ten days later Wincenty Karcz was arrested in Atlanta, Georgia, and brought back to Chicago. At the May term of the criminal court an indictment was returned against all four of the above named parties, charging them with the murder of Tietlebaum. A trial was had at the November term of said court, the defendants were found guilty as charged in the indictment and the punishment of each was fixed at twenty-five years in the penitentiary. After overruling motions for a new trial and in arrest, judgment was rendered on the verdict. A writ of error has been sued out of this court by Nogawischi, Gukouski and Krolkowski to review that judgment.

At the beginning of the trial, on October 26, 1909, counsel for Gukouski, Nogawischi and Krolkowski made a motion, supported by the affidavit of Nogawischi, for a separate trial from the defendant Karcz. The motion was overruled, and this action of the court is assigned as error. At a previous term all the defendants had been arraigned and entered pleas of not guilty. Such a motion is ad-

dressed to the discretion of the court, and the action of the court in overruling the motion is not subject to be reviewed unless there is a clear abuse of the discretion. (*Gillespie v. People*, 176 Ill. 238; *Doyle v. People*, 147 id. 394.) From an examination of the affidavit upon which the motion was based we are of opinion there was no abuse of discretion by the court.

Alleged confessions of each of the four defendants were offered and received in evidence. The confession of Nogawischi was made to police officer Kandzia on the day he was arrested and before either of the other defendants had been taken into custody. It was not reduced to writing but was testified to by Capt. Kandzia. Krolikowski and Gukouski the next day made confessions and their confessions were reduced to writing and signed by them. When Karcz was brought back to Chicago he also made a confession, which was reduced to writing and signed by him. Krolikowski and Gukouski also made affidavits used by the police officers in extraditing Karcz. The affidavits purported to relate the circumstances of the shooting of Tietlebaum, and they were sworn to by the parties before Judge Himes, of the municipal court. It is contended these confessions and affidavits were erroneously admitted in evidence by the court.

All the defendants were Poles, and none of them but Nogawischi could speak, read or understand the English language. Capt. Kandzia testified that Nogawischi, when brought to his office after being arrested, was shown the hat that was found in the vicinity of the homicide and said it was his, and said he might as well tell it all. Witness testified he told him to tell the truth, and inquired of Nogawischi if he was willing to have his statement reduced to writing and sign it. He said he was willing to do so, but it was not written out or signed. Witness and Nogawischi talked in the Polish language. Capt. Kandzia testified that the following day Nogawischi, Krolikowski and Gukouski

were all in his office at one time, and in the presence of each other, and in the presence of Sergeant Heilinski and officer Pawlowski, Nogawischi repeated the confession or statement made the day before, substantially as he made it the first time. At the same time Krolikowski and Gukouski made confessions, which were written down by Capt. Kandzia in the English language and were afterwards translated to each of them in the Polish language, sentence by sentence, and signed by Krolikowski and Gukouski, respectively.

Capt. Kandzia testified that Nogawischi said, in the presence of Krolikowski and Gukouski, that the four met in the afternoon before the shooting and agreed to go out to Seventeenth street to upset a baker's wagon; that they met Karcz in front of the elevated station on Eighteenth street, in the vicinity where the homicide was committed, about one or half-past one o'clock in the morning; that Karcz then said, "Now, let's go over and upset the wagon; I know the place and I am the bravest man of us all; I will do the attacking;" that they went to Seventeenth street, near Wood, where Blonski's wagon was expected to deliver bread; that they waited there about two hours before the wagon came; that Nogawischi, Krolikowski and Gukouski hid alongside the house while Karcz remained in front, and when the wagon came Karcz began shooting at the driver. The other three started to run and Nogawischi lost his hat. Capt. Kandzia testified that after Nogawischi had made this statement in the presence of Krolikowski and Gukouski they said it was correct. Witness then asked Krolikowski and Gukouski if they would make a statement and have it written down, and they said they would. Witness testified he told them they did not have to make any statement if they did not wish, and that if they did make it, it might be used against them. They expressed themselves as willing to make the statement. Capt. Kandzia testified they each talked in Polish, and that he translated their

statements into English and wrote them down. After completing the statements he translated them, sentence by sentence, into the Polish language to the parties, and they were then signed by the parties, respectively. Nogawischi was present when these statements were made, translated and signed.

Sergeant Heilinski testified he was a Pole and understood and spoke the Polish language; that he was present when the statements were made by Krolikowski and Gukouski to Capt. Kandzia and written down by him, and that Capt. Kandzia translated the statements from English into Polish before they were signed. The witness testified he, himself, read the statement of Krolikowski.

There is no evidence whatever that these confessions or statements were not freely and voluntarily made. The defendants all testified in their own behalf and did not deny that they made statements about the circumstances of the shooting freely and voluntarily, but they claim the statements they made were not taken down accurately by Capt. Kandzia, or, at least, that they did not know when they signed them that they contained certain matters that were in the papers when they were introduced in evidence. The written statements signed by Krolikowski and Gukouski the day following their arrest purported to be in their language, respectively. The circumstances under which they were made and signed entitled them to be admitted in evidence. The value of confessions as evidence depends upon the circumstances under which they were made. The jury had all the circumstances before them, and the weight and credit to be given to the oral confession of Nogawischi and the written confessions or statements by Krolikowski and Gukouski were matters for them to determine.

The substance of Krolikowski's signed statement was, that about one o'clock in the morning of the shooting Karcz proposed to the other three that they all go to Seventeenth street to upset a bakery wagon and destroy the bread,

and this was agreed to. Karcz said he was the bravest man and would attack the driver. Karcz met the other three in front of the elevated station at Eighteenth street, and the four of them went to the grocery store where the bakery wagon was expected to deliver bread. They waited about an hour, hidden alongside the building, before the wagon came. When the wagon came Karcz jumped out and began to shoot at the driver. Krolikowski didn't know how many shots were fired. When he heard them he ran away and went home. He didn't know Karcz had a pistol. Karcz told him the driver was driving for Blonski, whose bakers were on a strike. The statement of Gukouski was not entirely in the same language as that of Krolikowski, but in their material features the two statements were substantially the same.

While the affidavits sworn to before Judge Himes by Krolikowski and Gukouski are not in the exact language of their signed statements they are substantially so, the only difference being, that in the affidavits they say Karcz said he was the "heaviest" man and would attack the driver, while in the signed statements "bravest" is used instead of "heaviest." Police officer Pawlowski testified he was present when Krolikowski and Gukouski signed and swore to the affidavits before Judge Himes; that they were read over and translated by him correctly in the Polish language, and the parties were told that they need not sign them if they did not want to. Judge Himes testified he remembered swearing the parties to the affidavits; that he believed they were read over to the parties and they were made to understand them before they were signed, but he would not be positive as to that. His best recollection was that they were. We think, under the proof, they were properly admitted in evidence.

Karcz's statement was made the day he returned from Georgia to Chicago. He said he met the other three defendants at the elevated station on Eighteenth street and

asked them what they were doing, and one of them said they were going to upset Blonski's wagon. Karcz said he would go with them, and they went to Seventeenth street near Paulina street. Karcz stopped in front of a grocery store, and the other three went, he did not know where. He lit a cigarette, and when the wagon came he jumped to the driver and told him to keep still and not move. The driver made a motion as if to reach for his pocket and Karcz drew his revolver and fired three shots at him. He then ran away. He threw his revolver away and when he got home told one of the boarders what had happened. The boarder told him he had better go to Atlanta, Georgia, and he went there. He did not know the driver but knew that it was Blonski's wagon and knew that Blonski's bakers were on a strike. They were all bakers by trade, and, as we understand it, members of the Bakers' union. Karcz testified on the trial and denied the correctness of the statement written down by Capt. Kandzia. He did not deny making a statement and that it was written down by Capt. Kandzia, but denied that as written down it was correct. He testified that when he met the other three defendants at the Eighteenth street station he did not know where they were going; that he inquired of them, and they told him they had a friend on Wood street and asked him to go with them; that when they came to Wood street they all took a drink of whisky out of a bottle Gukouski was carrying and then went around a house; that Nogawischi said he would go and find out, and went out somewhere. Karcz asked Krolikowski what they were waiting for, and he said Blonski's wagon. Nogawischi then came back and said, "He is coming." The three, Nogawischi, Krolikowski and Gukouski, then jumped out toward the wagon and Nogawischi drew his revolver. All three of them ran after the wagon and Nogawischi was shooting. Karcz then ran toward Paulina street and went home. He testified that Nogawischi and Krolikowski came to his place and said to

him that if he ever told anybody about what happened they would kill him.

Plaintiffs in error all testified on the trial. They denied stating to Capt. Kandzia that the four defendants went to the grocery store, by agreement, to turn over the bakery wagon and destroy the bread. In substance their testimony was that Karcz asked them to go with him, but they did not at the time know he contemplated anything more than talking with the driver of the bakery wagon. When he spoke of turning the wagon over and destroying the bread they remonstrated with him against it, and when he insisted upon doing so they stopped some little distance before reaching the grocery store and shortly afterwards heard a number of shots fired. They then went home.

The foregoing is the substance of the material testimony upon which the verdict and judgment were based. It will be seen the testimony of plaintiffs in error on the trial was in conflict with that of Karcz, and the testimony of all of them was in conflict with their written confessions and that of Nogawischi with his oral confession. It was the province of the jury, therefore, to determine whether the testimony of the parties on the trial or their confessions and the affidavits of two of them made before the trial were true.

It is very earnestly contended by counsel for plaintiffs in error that if the written statements or confessions of Krolikowski and Gukouski and their affidavits, and also the oral confession of Nogawischi, be accepted as true, they are insufficient to sustain the conviction of plaintiffs in error of the crime of murder. It is argued these confessions show that murder was not in their minds or contemplation; that their only purpose in going to the place where the shooting occurred was to upset the bakery wagon and destroy the bread in it; that they had no knowledge Karcz had a pistol or contemplated shooting the driver of the wagon, and his doing so was a great surprise to them. Ac-

cording to the confessions of the plaintiffs in error the agreement was that they were to go to the store where Tietlebaum, the driver of Blonski's bakery wagon, was expected to deliver bread, and upon his arrival there they were to upset the wagon and destroy its contents, and Karcz, either on account of being the "bravest" or the "heaviest" man of the four, was to attack the driver. The agreement contemplated not only upsetting the wagon and destroying its contents, but personal violence to the driver of it. If their confessions are to be believed, plaintiffs in error anticipated that in accomplishing their object of upsetting the wagon and destroying the bread it would be necessary also to assault the driver. They must be presumed, therefore, to have intended to use whatever means might appear necessary to overcome any resistance of the driver of the wagon in attempting to protect it and its contents and to prevent plaintiffs in error and Karcz from accomplishing their purpose. It was not necessary that they should have expressly agreed to take the life of the driver of the wagon in order to render all of them liable for the act of Karcz in shooting him. They had entered into a conspiracy to perform an unlawful act,—to commit a crime. They contemplated that violence to the person of the driver would be necessary for the carrying out of their conspiracy and common purpose. In such case the law makes all the conspirators liable for the acts of one done in furtherance of the common object.

In *Brennan v. People*, 15 Ill. 511, it was said: "The prisoners may be guilty of murder although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act and death happens in the prosecution of the common object, all are

alike guilty of the homicide. The act of one of them done in furtherance of the original design is, in consideration of law, the act of all."

In *Lamb v. People*, 96 Ill. 73, it was said: "Where the accused is present and commits a crime with his own hands or aids and abets another in its commission, he may, in either case, be considered as expressly assenting thereto. So where he has entered into a conspiracy with others to commit a felony or other crime under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. * * * The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to crimes and mere civil injuries, that every person must be presumed to intend, and is accordingly held responsible for, the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act he impliedly assents to the use of such means by his co-conspirators as is necessary, ordinary or usual in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not."

In Wharton on Criminal Law (vol. 1, sec. 220,) it is said: "It is not necessary that the crime should be part of

the original design; it is enough if it be one of the incidental, probable consequences of the execution of that design and should appear at the moment to one of the participants to be expedient for the common purpose. Thus where A and B go out for the purpose of robbing C, and A, in pursuance of the plan and in execution of the robbery, kills C, B is guilty of the murder. In such cases of confederacy all are responsible for the acts of each, if done in pursuance of the common design. This doctrine may seem hard and severe, but, as has been well argued, has been found necessary to prevent persons engaged in riotous combinations from committing murder with impunity, for where such illegal associates are numerous it would scarcely be practicable to establish the identity of the individual actually guilty of a specific wrong."

In McClain on Criminal Law (vol. 1, sec. 196,) the author says: "It results from the principle stated in the preceding section, that everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination perpetrated in the prosecution of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and proximate result of carrying out such purpose, and the question whether the result is the natural and probable effect of the wrongful act intended is for the jury. Thus, if several persons agree to commit and enter upon the commission of a crime involving danger to human life, such as robbery, or assault and battery, or resisting an officer or resisting arrest, all are criminally accountable for death caused in the common enterprise. Thus, also, if the unlawful enterprise is likely to meet violent resistance, all will be liable for a felonious assault

committed by one of their number in consequence of such resistance, and if the common design, in general, involves acts of violence, all who participate in the common plan are equally answerable for acts of others done in pursuance thereof, although the result was not specially intended by them all."

If the jury believed the confessions of plaintiffs in error to be true,—and we are unable to say they were not warranted in doing so,—they were justified, under the law, in finding them guilty of the murder of Tietlebaum.

There was no error in the giving or refusing of instructions of such prejudicial nature as to justify a reversal of the judgment, and it is affirmed. • *Judgment affirmed.*

THE T. E. HILL COMPANY, Defendant in Error, *vs.* THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. PRACTICE—when bill of exceptions in the municipal court is signed in time. If one extension of sixty days' time to file a bill of exceptions in a municipal court case of the first class is properly allowed and the bill is signed and sealed by the judge within such sixty days the bill is signed and sealed within the time required by section 38 of the Municipal Court act.

2. SAME—party cannot be prejudiced by delay of judge in signing bill of exceptions. If a bill of exceptions is presented to the trial judge at such time that it can be filed within the prescribed time if signed and sealed, the party will not be prejudiced by the neglect or delay of the judge to sign the bill until after the prescribed time.

3. SAME—when bill of exceptions may be filed *nunc pro tunc* as of the date of presentation. If a bill of exceptions is presented within the time lawfully extended by the court and that fact is shown on the bill itself, it may be filed *nunc pro tunc* as of the date of presentation, within a reasonable time after the bill is actually signed by the judge.

4. SAME—*failure to file bill of exceptions nunc pro tunc is not ground for a motion to strike.* If a bill of exceptions is presented within the extension of time lawfully granted by the court and the date of presentation appears on the bill, the trial judge, upon signing the bill, should date it as of the date of presentation, and an order should be obtained to file it *nunc pro tunc* as of that date, but a failure to do so is a mere irregularity and is not good ground for a motion to strike the bill from the files.

5. BANKRUPTCY—*the receiver and marshal take possession of bankrupt's property for same purpose.* The receiver in bankruptcy and the marshal take possession of the bankrupt's property for substantially the same purpose, and while the language prescribed by the Bankruptcy act for the bonds to be given in the respective instances differs in some respects, the bonds are given for the same purpose and are to be given the same interpretation.

6. SAME—*when recovery may be had on petitioning creditor's bond when petition is dismissed.* Where a receiver in bankruptcy is appointed and a bond is given which is conditioned in the language required by section 69a of the Bankruptcy act, relating to bonds given when the marshal takes possession of the property, a recovery of damages and costs may be had on such bond, under section 3e of said act, when the petition is subsequently dismissed, even though the seizure by the receiver is not proven to have been wrongfully obtained.

7. SAME—*dismissal of the petition shows that receiver's seizure was wrongfully obtained.* Construing together sections 3e and 69a of the national Bankruptcy act, the words "wrongfully obtained," used in section 69a, must be held to include the securing of the order of seizure if the petition is thereafter dismissed, and it must therefore be held that a receiver's seizure is wrongfully obtained, if the petition is dismissed, even though the bankruptcy court had jurisdiction to enter the order and it was not obtained through fraud or with malice and without probable cause.

8. SAME—*allowance of damages by bankruptcy court is not a condition precedent to recovery on bond.* An allowance of damages by the bankruptcy court upon the dismissal of the petition, as provided in section 3e of the Bankruptcy act, is not a condition precedent to a recovery by the bankrupt upon a bond conditioned in the language of section 69a of such act, as the remedy provided by said section 3e is a cumulative one.

9. SAME—*wrongful detention of property by receiver after corporation has made an assignment is a damage.* The wrongful detention of property by a receiver in bankruptcy for more than a year after the corporation defendant made a voluntary assignment

for its creditors is a damage to the corporation within the meaning of a bond conditioned in the language of section 69a of the Bankruptcy act notwithstanding the making of the assignment, as any property remaining in the assignee's hands after the debts of the corporation are paid must be returned to it.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. JOHN H. HUME, Judge, presiding.

JOHN A. BLOOMINGSTON, for plaintiff in error.

BUELL & ABBEY, and FRED W. BENTLEY, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action brought in the municipal court of Chicago by defendant in error against plaintiff in error, the latter company having signed as surety a petitioning creditors' bond for the appointment of a receiver in an involuntary bankruptcy proceeding in the United States District Court. On November 18, 1905, shortly after the receiver took possession of the property, defendant in error made a voluntary assignment for the benefit of creditors. The order of the United States Court of Appeals affirming the decision of the district court dismissing the petition was entered November 25, 1906. The suit on this bond was begun February 6, 1907. The cause was submitted to the trial judge without a jury and judgment entered in favor of plaintiff in error. The cause being taken to the Appellate Court for the First District by writ of error, the judgment of the trial court was reversed and judgment entered in the Appellate Court in favor of the defendant in error for \$5000 debt and \$5000 damages. Thereafter, on a petition for *certiorari*, the cause was brought here for further review.

Plaintiff in error has moved in this court to strike the bill of exceptions from the files, and this motion was taken with the case. The judgment was rendered in the municipal court March 19, 1908. On the same day an order was entered that a bill of exceptions be filed in forty days. April 25, 1908, the time for filing a bill of exceptions was extended sixty days from April 28, 1908. June 15, 1908, the time for filing a bill of exceptions was extended sixty days from June 27. September 28, 1908, the bill of exceptions was signed and was filed in the municipal court the same date. It was marked as follows: "June 25, '08, presented for signature.—John H. Hume, Judge." It was filed as of September 28, 1908, and not as of June 25.

It is first insisted that the motion to strike the bill of exceptions from the files should be sustained because section 38 of the Municipal Court act permits, in first-class cases such as this, only one extension of time for filing the bill of exceptions. If the bill of exceptions had been signed and sealed by the judge when it was presented on June 25, 1908, no question could be raised as to its being signed within the time required by statute. (*Haines v. Danderine Co.* 248 Ill. 259.) It is further insisted by counsel that the bill of exceptions should be stricken because it was filed September 28, 1908, when it should have been filed by a *nunc pro tunc* order as of the date when it was presented to the trial judge. The rule is, that if a bill of exceptions is presented to the trial judge at such time that it can be filed within the time provided by the order of the court, the party will not be prejudiced by the neglect or delay of the judge to sign the bill until after the time fixed for that purpose has expired. If the date of presentation appears on the bill when it is signed and sealed it can be filed *nunc pro tunc* as of the date of such presentation. (*Hall v. Royal Neighbors*, 231 Ill. 185; *Underwood v. Hossack*, 40 id. 98; *Evans v. Fisher*, 5 Gilm. 453; *Goodrich v Cook*, 81 id. 41.) A bill of exceptions purports to be

signed at the time the exception is taken in the course of the trial, whether it is presented then or afterwards, but if it is presented within the time as extended by the court and that fact is shown on the bill, it may be afterwards filed as of that date within a reasonable time after it is actually signed. (*Hall v. Royal Neighbors, supra.*) Where a bill of exceptions is actually signed and filed ten days after the trial, it is not necessary to render it effective that it should be entered and filed *nunc pro tunc* as of the date of the trial. (*Hunnicutt v. Peyton*, 102 U. S. 333.) The court said in the case just cited, that while the bill might be signed as of the date of the judgment, the giving of the true date would not destroy it; that "the reason why it is required that bills shall be presented for signature during the term is that the rulings made may be fresh in the memory. Are they any more fresh in his memory when he antedates the bill or orders it to be filed as of the date of the trial than when he gives to the signature and filing their true date? We cannot doubt that in a multitude of cases bills of exception have been signed after judgment and filed without any order that the signature and filing be entered *nunc pro tunc*, but, when the true time of the signature appeared, having been treated as sufficient whenever they have shown that the exceptions were taken during the trial." While it is true that this reasoning was applied in a case where the bill of exceptions was signed during the term, it applies with equal force where the bill of exceptions is actually presented to the judge within the time provided by the order of court, for it is conceded that, under the authorities, having been so presented it could be filed, after it was signed and sealed, as of the date when it was so presented, the same as a bill of exceptions signed and sealed during the term when the trial was had could be signed and sealed during the term and filed as of the date of the trial. As a matter of proper practice the judge should have dated it, after signing, as of the date when it was presented,

and an order should have been procured filing it as of that date. At the most, however, the failure to do this was only an irregularity and does not render the bill of exceptions void. (*Railway Conductors' Benefit Ass'n v. Leonard*, 166 Ill. 154.) The motion to strike the bill of exceptions will be denied.

It is insisted that there was no breach of the bond upon which this suit was brought. It was given pursuant to the order of the United States District Court, which, after reciting that the appointment of a receiver was necessary for the preservation of the estate, provided that the petitioning creditors file a bond in the sum of \$5000, as provided by statute, before said receiver should take possession under the appointment. The condition of the bond given was, that if the receiver was appointed and seized the property the said T. E. Hill Company should be indemnified "for such damages as it shall sustain in the event such seizure shall prove to have been wrongfully obtained," etc. It is provided by the national Bankruptcy act, in section 3e, that on an application being made, after a petition has been filed to adjudge a person a bankrupt, to take charge of the property of said bankrupt prior to the adjudication and pending a hearing, a bond shall be filed conditioned "for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property," etc. Section 69a of the Bankruptcy act provides for the taking possession of the property by the marshal on the giving of a bond conditioned to indemnify the bankrupt "for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." The Bankruptcy act also provides that the Supreme Court of the United States shall prescribe all necessary rules and forms of orders and the procedure for carrying the act into effect, and that court has accordingly issued a number of general orders, among others a

form of a bond when the marshal is directed to seize the property. That court has also provided that "the several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances in each particular case."

It is conceded that if the condition of this bond had been in accordance with section 3e there could have been a recovery as the petition in bankruptcy was dismissed, but it is argued that the form of the bond corresponded to section 69a, and that there can be no damages recovered because the seizure by the receiver was not proven "to have been wrongfully obtained." While the language as to the conditions of the bonds in the two sections differs, still, as the appointment of the receiver and the order for the marshal to take possession are intended to accomplish the same object, the provisions in the two clauses should, if possible, be given the same interpretation. That the receiver and the marshal take possession of the property for substantially the same purpose is shown not only by the wording of subsection 3 of section 2 of the Bankruptcy act, but has been so held by the courts. (*Guaranty Title and Trust Co. v. Pearlman*, 144 Fed. Rep. 550; *Whitney v. Wenman*, 198 U. S. 539.) Manifestly, the Supreme Court of the United States was of this opinion, otherwise a special form of bond would have been prescribed for the appointment of a receiver under section 3e.

We have already held in *Hill Co. v. Contractors' Supply and Equipment Co.* 249 Ill. 304, that the United States District Court had jurisdiction of the parties and the subject matter in these same bankruptcy proceedings for the appointment of a receiver, and that therefore there was no common law action, unless malice and lack of probable cause could be shown, growing out of such appointment of the receiver, even though the bankruptcy proceedings were subsequently dismissed. It must be held, therefore, that section 3e creates a new cause of action whereby damages

and costs may be recovered under the bond required, if the petition is dismissed without malice and probable cause being shown

It is further insisted that as the court had jurisdiction the seizure of the property was not "wrongfully obtained," under the condition of the bond, merely because the petition was dismissed; that these words mean that the order must have been obtained through some fraud or imposition upon the court or with malice and lack of probable cause. If section 69a were the only provision of the Bankruptcy act on this subject there would be force in this argument, but in the light of the common purpose of the two sections, "wrongfully obtained," in section 69a, should be held to include the securing of an order of seizure when thereafter the petition shall be dismissed. The two sections could then fairly be interpreted to provide for practically the same bond, as the Supreme Court provides in its rules, with such minor changes as may be necessary to suit the circumstances, such as substituting the word "receiver" for "marshal." This being so, the seizure of the property by the receiver must be held "to have been wrongfully obtained."

It is further argued that there could be no recovery under section 3e, reading, "counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in said bond," until after the damages had been fixed by the United States court. If the bond given had been expressly conditioned for the payment of such damages as should be first allowed by such court, then there would have been no breach of the bond until the bankruptcy court had first allowed such damages. The construction that we have placed upon the Bankruptcy act justifies the conclusion that such allowance is not a condition precedent; that the remedy given under section 3e is cumulative, and the plaintiff may, if he pleases, pursue this remedy on the bond. The fact that the plaintiff in error is a surety company tends to strengthen this conclusion as to

the proper construction of this bond, for its liability under this bond is to be held and construed, in a certain sense, as a contract of insurance. *United States Fidelity Co. v. First Nat. Bank*, 233 Ill. 475; *Leshner v. United States Fidelity Co.* 239 id. 502; *American Bonding and Trust Co. v. Baltimore and Ohio and Southwestern Railroad Co* 124 Fed. Rep. 866.

The Contractors' Supply and Equipment Company, which filed the petition for the appointment of a receiver consented, in writing, that the plaintiff in error could interpose as a set-off a claim due it from defendant in error. It is contended that the Appellate Court should have allowed this set-off. We deem it a sufficient answer to this contention to state that we find no proper proof in this record that said petitioning creditor was the owner of any indebtedness at the time of the trial of this cause which it could transfer to plaintiff in error.

It is further urged that as the defendant in error made a voluntary assignment for the benefit of its creditors two months after the order appointing the receiver, and said bond was only to indemnify as to such damages as should come to defendant in error, no damages could be considered as to this assignee. The assignor in this case retained an interest in its property, and, notwithstanding the assignment, remains liable for debts. After their payment the remaining property, if any, is to be returned to it. Wrongful detention of the property after the voluntary assignment would therefore "damage" the defendant in error, as that word is used in this bond.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

LINVILLE H. GEORGE *et al.* Defendants in Error, *vs.* SAMUEL E. GEORGE *et al.* Plaintiffs in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. PRACTICE—*effect of plea of Statute of Limitations to writ of error.* The effect of a plea of the Statute of Limitations to a writ of error is to confess that there is error in the record for which the decree must be reversed, and if it is held that the Statute of Limitations does not apply a reversal of the decree must follow.

2. SAME—*right to review judgments by writ of error in cases involving a freehold is constitutional.* The jurisdiction of the Supreme Court to review, by writ of error, judgments or decrees in cases involving a freehold is not dependent upon statute but is conferred by the constitution, and the right of the parties to sue out a writ of error in such cases is a constitutional right, which must be allowed when claimed.

3. SAME—*the legislature cannot abridge right to writ of error where freehold is involved.* The legislature has no power to deprive the Supreme Court of jurisdiction to review freehold cases by writ of error nor to in any manner abridge such jurisdiction, but it may, by proper enactment, limit the time within which such writ may be sued out.

4. SAME—*section 117 of the Practice act is purely a statute of limitation.* Section 117 of the Practice act of 1907 merely limits the time within which writs of error may be sued out, and is purely a statute of limitation and must be construed as such.

5. SAME—*a writ of error is a new suit—statutes of limitation.* The suing out of a writ of error is the beginning of a new suit, and the rules which govern the application of statutes of limitation to other causes of action should be applied where that defense is pleaded to the writ.

6. SAME—*section 117 of Practice act, reducing time for suing out writ of error to three years, is not retroactive.* Following the general rule that a statute of limitation will not be given retrospective effect in the absence of an intention clearly manifested in the act itself, section 117 of the Practice act of 1907, reducing the time for suing out a writ of error to three years, must be held to apply only where the right to sue out such writ accrued after the act took effect and as not affecting pending rights, notwithstanding the parties had a reasonable time to sue out the writ after the act took effect.

CARTER, J., dissenting.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. GEORGE A. DUPUY, Judge, presiding.

DANIEL S. WENTWORTH, (HARVEY L. CAVENDER, of
counsel,) for plaintiffs in error. .

FRED H. ATWOOD, FRANK B. PEASE, and CHARLES O.
LOUCKS, for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is a writ of error sued out to review a decree for the partition of real estate, entered in the superior court of Cook county on March 29, 1907. The writ was issued on September 20, 1910, and the defendants in error have filed their plea of the Statute of Limitations, alleging that under section 117 of the Practice act (Laws of 1907, p. 466,) the plaintiffs in error are barred from suing out their writ of error, the same not having been done within three years, as provided by said section. To this plea plaintiffs in error have filed a demurrer, claiming that they are not governed by the act of 1907 limiting them to three years within which to prosecute their writ of error, but that their rights accrued under the former statute and that they have five years' time in which to prosecute their writ, as provided by the law at the date of the decree. The only question to be determined is whether the act of 1907 applies to writs of error sued out to review judgments or decrees rendered prior to the passage of that act. If it be held that it does apply, then this writ must be dismissed. If it be held that it does not apply and the demurrer to the Statute of Limitations be sustained, then a reversal of the decree must necessarily follow, as the effect of the plea is to confess that there is error in the record for which the decree must be reversed. *Mahony v. Mahony*, 139 Ill. 14; *Peterson v. Manhattan Life Ins. Co.* 244 id. 329.

The jurisdiction of this court to review the judgments and decrees of trial courts in this class of cases by writs of error does not depend upon the statute. That jurisdiction is conferred by the constitution, and the right to sue out a writ of error is a constitutional right and must be allowed when claimed. (*Schlattweiler v. St. Clair County*, 63 Ill. 449.) Section 2 of article 6 of the constitution provides that the Supreme Court shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases. Section 8 of the same article provides that appeals and writs of error may be taken to the Supreme Court. In this case a freehold is involved, and the parties to this decree have a constitutional right to sue out a writ of error in this court to review that decree. It is not within the power of the legislature to deprive the Supreme Court of the jurisdiction to review such cases by writs of error or in any manner to abridge that jurisdiction, but the legislature may by proper enactment regulate the practice in respect to writs of error and may limit the time within which writs of error may be sued out of this court. Section 117 of the Practice act of 1907 does not attempt or pretend to confer jurisdiction upon the Supreme Court to review judgments and decrees by writs of error, but merely limits the time within which such writs may be sued out. It is strictly a statute of limitations and must be construed as such.

We have repeatedly held that the suing out of a writ of error is the beginning of a new suit. (*Ripley v. Morris*, 2 Gilm. 381; *Roberts v. Fahs*, 32 Ill. 474; *International Bank v. Jenkins*, 107 id. 291; *Singer & Talcott Stone Co. v. Hutchinson*, 176 id. 48.) The rules which govern the application of statutes of limitations to other causes of action should therefore be applied here. In the early case of *Thompson v. Alexander*, 11 Ill. 54, it was held that the amendment of February 10, 1849, to the Limitation act operated only in causes of action accruing after it took effect.

That was an action in debt, brought on a promissory note maturing May 11, 1838. The defendant pleaded the Statute of Limitations, and set up that the cause of action had accrued more than five years before the commencement of the suit. Prior to the amendment of February 10, 1849, actions in debt could be brought on promissory notes at any time within sixteen years after the right of action accrued. That act limited the bringing of such actions to five years, and we held that a retrospective effect will not be given to such an act unless it clearly appears that such was the intention of the legislature, which intention must be manifested by clear and unequivocal expressions; and in the absence of any such intention of the legislature having been so manifested, it was further held that the provisions of that act should only apply to causes of action arising after it went into operation, and the judgment of the trial court in sustaining a demurrer to the plea of the Statute of Limitations was affirmed.

Hathaway v. Merchants' Trust Co. 218 Ill. 580, was a case where letters testamentary had been issued on January 13, 1903, and on May 2, 1904, the Merchants' Loan and Trust Company filed its claim against the estate, which was allowed on July 25, 1904. At the time the letters were issued, claims were allowed to be filed against estates within two years from the date of the granting of letters testamentary. On May 15, 1903, the Administration act was so amended as to require all claims against estates to be filed within one year from the date of granting of letters testamentary, and it was contended in that case that the claim of the Merchants' Loan and Trust Company should not have been allowed because it was not filed in the probate court within one year from the granting of letters testamentary. In that case we held that the section of the Administration act fixing the time for filing claims against an estate is not a statute conferring jurisdiction but is a limitation act, which will not be given retroactive effect in

the absence of clear legislative intention, and that that act, as amended by the act of 1903 reducing the time for filing claims to one year, does not apply to claims against an estate upon which letters testamentary had been granted before the act took effect. There is nothing in section 117 of the Practice act of 1907 which indicates that the legislature meant it to be retroactive in its effect. Its provisions in that respect are similar to those of the amendment of May 15, 1903, to the Administration act, which was construed in the *Hathaway case*.

In addition to the general rule that limitation acts will not be given a retroactive effect in the absence of clear legislative intention, section 4 of the act to revise the law in relation to the construction of statutes provides that no law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any right accruing or claim arising under the former law, or in any manner whatever to affect any right accruing or claim arising before the new law takes effect. The right of plaintiffs in error to sue out a writ of error from this court to review the decree of the superior court of Cook county, and thus begin a new suit, accrued at the time that decree was entered, and therefore was a right accruing under the law in effect at that time. The statute at that time provided that a writ of error should not be brought after the expiration of five years from the rendition of the decree or judgment complained of.

Defendants in error insist, however, that as this decree was rendered on March 29, 1907, and the new Practice act became effective on July 1, 1907, plaintiffs in error had almost three years within which to sue out this writ of error after that act became effective, and that as this must be held to be a reasonable time, the new limitation should prevail in this case. This act must be applied generally to all causes of action accruing before the act of 1907 became effective. It cannot be said that the act will apply in one case and not

in another. (*Hathaway v. Merchants' Trust Co. supra.*) Applying the rule of uniformity, the question whether a reasonable time was left plaintiffs in error within which to sue out their writ of error is not open for our decision.

For the reasons given the demurrer must be sustained and a reversal of the decree must follow.

The decree of the superior court is reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE CARTER, dissenting.

THE COMMISSIONERS OF LINCOLN PARK, Appellants, vs.
WILLIAM H. FAHRNEY, Appellee.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. CONSTITUTIONAL LAW—the Park act of 1895, for reclaiming submerged land, is not invalid as a special law. The Park act of 1895, (Laws of 1895, p. 282,) for enlarging parks by reclaiming submerged lands, is not invalid because it applies only to parks where the commissioners have been named in the act establishing the park and their successors have since been appointed by the Governor, as the general subject of parks is not included among those enumerated in section 22 of article 4 of the constitution, concerning which no local or special laws can be passed.

2. SAME—the Park act of 1895 does not authorize destruction of riparian rights without compensation. The Park act of 1895, (Laws of 1895, p. 282,) is not unconstitutional upon the ground that it authorizes the park commissioners to destroy riparian rights without compensation and without due process of law, as section 2 of the act makes express provision for the acquiring of such rights by contract, deed or condemnation.

3. SAME—subjects of Park act of 1895 are embraced within its title. The granting of submerged lands to the park commissioners and authorizing the filling, reclaiming and holding of such portions of submerged lands for park purposes are embraced within the general subject of Park act of 1895, (Laws of 1895, p. 282,) and this subject is sufficiently expressed in the title of such act.

4. SAME—title of act need not refer to every detail in the body of the act. The provision of section 13 of article 4 of the consti-

tution concerning the titles of acts does not require that the title shall refer to every detail in the body of the act necessary to effectuate the purposes of the statute.

5. *WATERS*—*shore owner does not lose title to submerged land in case of an avulsion.* In case of an avulsion, which is the washing away of a considerable portion of shore land by the sudden action of the water, the owner does not lose title but may reclaim the submerged portion and re-assert his ownership; but the mere fact that the shore line of a particular tract has receded somewhat in the course of time does not establish an avulsion.

6. *SAME*—*State had power to grant title to submerged lands in Lake Michigan.* The State had power to grant to the commissioners of Lincoln Park, for park purposes, the submerged lands of Lake Michigan, and shore owners have no right to erect piers or other structures on such submerged lands without the consent of the commissioners. (*Revell v. People*, 177 Ill. 468, *Gordon v. Winston*, 181 id. 338, and *Cobb v. Lincoln Park Comrs.* 202 id. 427, adhered to.)

7. *SAME*—*shore owners on Lake Michigan do not have riparian rights of owners on navigable streams.* The riparian right of a shore owner on Lake Michigan is limited to the right to pass from his land, within its boundaries, to the waters of the lake, but does not include the right to build piers or to wharf out, as may be done by a riparian owner whose title to the land, unless otherwise expressly limited, extends to the center thread of the stream. (*City of Peoria v. Central Nat. Bank*, 224 Ill. 43, explained.)

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

This is an appeal from a decree entered by the circuit court of Cook county denying the relief prayed in the original and supplemental bills filed by the Commissioners of Lincoln Park, appellants, and granting relief to appellee, Fahrney, upon his cross-bill. The original bill was filed by the appellants in 1897 against John Lewis Cochran, then the owner of blocks 1, 8, 9, 16, 17 and 21, in Cochran's addition to Edgewater, city of Chicago. The property described is a subdivision of the east fractional half of section 5, township 40, north, range 14, east of the third principal meridian, in Cook county, and bordered on the waters of Lake Michigan. The bill averred that Cochran

was constructing piers or bulkheads over the submerged lands of Lake Michigan without the consent of complainants; that complainants held the title to said submerged lands by virtue of an act of the legislature of the State of Illinois approved June 15, 1895, the terms of which act the complainants had fully complied with. The bill alleged that the said structures were purprestures, and would cause accretions to the adjoining shore and permanently and irreparably damage complainants. L. H. Brace, a contractor alleged to be engaged in doing the work, was made defendant. The bill prayed an injunction, and a temporary injunction was granted and issued on May 12, 1897, which remained in force until the hearing.

Cochran and Brace answered the bill in November, 1897, denying the effect of the further construction of piers and bulkheads would be to cause accretions and denying the title of complainants to the submerged lands. The answer averred that the submerged lands upon which it was intended to construct piers belonged to Cochran, or to other private persons connected with him in title whose consent he had to construct said piers. The answer further averred that prior to the passage of the act of 1895 Cochran's land extended two hundred feet further east than any piers had been built or were proposed to be built, but by violent avulsions of nature the land was torn or wrenched away, carried and deposited upon other parts of the shore, and the waters of the lake spread over the premises from their original boundary line to their present shore line. The answer averred Cochran still owned the land to the original shore line and had the right to construct piers thereon.

No step of any importance was taken after the filing of the answer, except a reference to the master to take proofs and report his conclusions of law and fact, until December, 1907, when appellee, Fahrney, who had purchased *pendente lite* lots 1 and 2 in block 9, filed a petition asking leave to become a party defendant. Leave was granted

and he filed an answer. In his answer appellee claimed the benefit of any defense set up by Cochran. Appellee alleged his property, lots 1 and 2, had a frontage west on Sheridan road of 104 feet and a depth of 216 feet, more or less, to the shore line of Lake Michigan; that appellee had built a costly residence upon the western end of his lots, a garage for his automobile about the middle on the south line of his lots, and from the east side of the garage to the waters of the lake he had constructed a slip or harbor dug out of the high land on his own property, to be used as a harbor or haven for his boat. This slip was alleged to be less than forty feet wide, and the answer alleged appellee had the right, and it was his purpose, to build two piers, forty feet apart, from the west shore of the lake extending eastward fifty feet into the lake. The space between the piers was to be for entrance into the slip or harbor constructed by appellee. On the same day the answer was filed appellee filed a cross-bill, and in addition to the allegations contained in the answer the cross-bill alleged that since the passage of the act of 1895 the legislature had passed two additional acts, one on May 14, 1903, amending section 2 of the act of 1895, the other on May 2, 1907, entitled "An act authorizing park commissioners to acquire and improve submerged and shore lands for park purposes, providing for the payment therefor, and granting unto such commissioners certain rights and powers, and to riparian owners certain rights and titles." The cross-bill alleged that by these three acts the riparian rights of owners of land on the shore of the lake were recognized and provided for, but that they authorized the destruction of said riparian rights without making compensation and without due process of law and are therefore unconstitutional and void. The cross-bill further alleged that the appellee obtained the qualified consent of the appellants to construct the piers in question under certain conditions, but that appellee was unwilling to comply with the conditions.

The prayer of the cross-bill was that appellee be declared to have the right to construct the piers as proposed and that appellants be enjoined from interfering with said construction. Amendments to the cross-bill set up with more detail that the east part of appellee's lots had been torn away by avulsions, and that previous to said avulsions his land extended 715 feet further east than the present shore line, and the submerged shallows were claimed by him.

Appellants answered the cross-bill, denying the allegations of avulsion and all other material facts alleged in the cross-bill. On June 28, 1909, the appellants filed a supplemental bill, wherein, among other things, it is alleged that since filing the original bill the legislature passed the act of May 14, 1903, amending section 2 of the act of 1895; also another act of May 14, 1903, relating to the issuing of bonds for park extension purposes, and a third act of the same date providing for the construction of driveways or boulevards over the submerged shallows of Lake Michigan. These statutes are set out in the supplemental bill, and it is alleged that under their authority and for the purpose of carrying out the general plan of park extension the boundary line between the lots of shore owners and the submerged shallows have been settled by the park commissioners for long distances (specifically set forth and described) along the shore. The supplemental bill further avers that the town of Lake View, pursuant to the statutes, has issued bonds in the sum of \$1,000,000 for park extension purposes; that this fund is now being used for that purpose, and the extension includes the shallows opposite appellee's property, the title to which is claimed by the appellant commissioners. The supplemental bill prayed that appellee be perpetually enjoined. Leave was granted for appellee's answer to the original bill as amended to stand as his answer to the supplemental bill.

A great deal of evidence, oral and documentary, was heard by the master from time to time, at the conclusion

of which he prepared a report, setting out and commenting upon the evidence at great length and containing an elaborate discussion of the law. He found the title to the submerged land in question to be in the appellants, that the alleged avulsions had not been proven, and recommended that the cross-bill of the appellee be dismissed for want of equity and a decree entered upon the original and supplemental bills as prayed therein. Appellee filed objections to the report before the master. He overruled them, and they were renewed as exceptions before the court. The court sustained exceptions to the recommendation that the cross-bill be dismissed and that the relief prayed in the original and supplemental bills be granted, and entered a decree modifying the temporary injunction as to appellee's property and authorizing him to construct two rows of piers built of piles upon and over the submerged lands of the park commissioners, each extending from appellee's land eastward a distance not to exceed fifty feet, for the sole purpose of an entrance to a harbor constructed by the appellee upon his lots and for no other purpose. The decree authorized appellee to construct and use the piers over the submerged lands without interference, hindrance or restriction by the park commissioners until such time as the work of the extension of Lincoln Park now being carried on actually reaches the property owned by the appellee. The court found and decreed that the act of 1895 and subsequent acts were constitutional, and that by compliance with the provisions of the act of 1895 by the park commissioners the title to the submerged lands lying between the north line of Grace street extended and Devon avenue (between which points appellee's lots are situated) became vested in the commissioners of Lincoln Park in fee simple, for park purposes; that the submerged land over which the appellee proposes to drive two lines of piles eastward from his shore line belongs to said park commissioners in fee simple, for park purposes. The decree further finds that the evidence

does not show that an avulsion occurred immediately east of appellee's property, and finds that appellee's land extends to the edge of the waters of Lake Michigan when they are at rest. This appeal is prosecuted by the park commissioners from the decree, and appellee has assigned forty-nine cross-errors questioning the correctness of the decree in holding the acts of the legislature referred to constitutional, that the title to the submerged lands is in appellants and that the evidence did not sustain the allegations of the cross-bill as to avulsions.

CHARLES A. CHURAN, and HAMLIN & BOYDEN, for appellants.

ABIJAH O. COOPER, ARTHUR R. WOLFE, and HENRY C. NOYES, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The principal issues raised by the pleadings are: First, whether the title to the submerged lands opposite appellee's lots is in appellants. That it is, is denied by appellee on the ground that the act of 1895 and subsequent acts are unconstitutional, and also because it is claimed that appellee's lots extended 715 feet further into the lake than the present shore line, and parts of them were wrenched and torn away by violent avulsions of nature between 1872 and 1877 or 1880. Second, whether, by reason of appellee's lots abutting upon Lake Michigan, he is thereby vested, as riparian owner, with the right to build piers over the submerged lands for the purpose of access to the navigable waters of the lake.

Appellee has by the assignment of cross-errors challenged the constitutionality of the act of 1895, and subsequent park acts adopted in 1903 and 1907. The title of the act of 1895 is, "An act to enable park commissioners having control of any park bordering upon public waters

in this State to enlarge the same from time to time and granting submerged lands for the purpose of such enlargements and to defray the cost thereof." The first section provides "that in all cases where lands within specified boundaries bordering on public waters in this State have been declared to be a public park, and where the commissioners of such park have been named in the act establishing the same, and their successors have since been appointed by the Governor of this State, the said commissioners of any such park shall have power from time to time in their discretion to enlarge the same by reclaiming submerged lands under said public waters in the following manner." Then follow directions to be complied with by the park commissioners in the enlargement of the park, the preparation and adoption of plans therefor, the location of a boulevard or driveway, etc., and authority is given the commissioners to fill in and reclaim all the submerged land lying between the boulevard and the shore line, and "thereupon the title of such submerged lands over which the said boulevard or driveway is located, and of the said submerged lands between said boulevard as located and the shore line shall become and be vested in and is hereby granted to the said board of commissioners, in fee simple for park purposes, as hereafter in this act set forth." The second section authorizes the park commissioners to acquire, by agreement with the owner or by condemnation, the riparian rights of the owners of lands along the shore so far as it may be deemed necessary and desirable by the commissioners.

The grounds upon which the validity of this act is assailed are: First, that it applies only to a park bordering on public waters where the commissioners have been named in the act establishing the same and their successors have since been appointed by the Governor, and it is asserted in the brief of counsel for appellee that Lincoln Park is the only park in the State bordering on public waters the commissioners of which were named in the act and their suc-

cessors have since been appointed by the Governor, and that said act is for that reason special or class legislation; second, said act is unconstitutional in that it permits the park commissioners to destroy riparian rights of shore owners without compensation and without due process of law; and third, the act embraces more than one subject not contemplated in the title, in violation of section 4 of article 13 of the constitution.

We do not think there is any merit in any of these contentions. As to the first point, the constitution does not prohibit the passage of any local or special act but only prohibits the passage of local or special laws upon any of the subjects mentioned in section 22 of article 4. In *Pettibone v. West Chicago Park Comrs.* 215 Ill. 304, the constitutionality of an act in relation to parks was attacked on the ground that it was in violation of the prohibition against any local or special law regulating township affairs. In discussing the question the court said (p. 330): "The constitution of 1870 does not prohibit the passage of all 'local or special laws,' as such. It only prohibits the passage of local or special laws in reference to the particular subjects mentioned in section 22 of article 4. * * * The first question, then, which arises, is whether the act of 1901 is an act regulating township affairs. If it is not, it is not necessarily a local or special law, because section 22 of article 4 does not prohibit the passage of local or special laws in regard to parks or regulating the affairs of parks." The act of 1895 is not in violation of any of the prohibitions of section 22 of article 4. The second contention is refuted by section 2 of the act itself. As to the third point against the constitutionality of the act, it is said section 1 authorizes the park commissioners to locate a boulevard or driveway and fix the termini thereof; that said section grants the submerged lands to the commissioners for the purpose of enlargement of the park, and authorizes filling, reclaiming, improving and holding portions of the submerged land des-

ignated in the plan adopted as a public park, and that these matters are not contemplated by or expressed in the title of the act. The act embraces but one general subject, viz., the enlargement of parks bordering upon public waters, and to enable this to be done the submerged lands are granted to the park commissioners. This subject is sufficiently embraced in the title. The constitution does not require that the title shall refer to every detail in the body of the act necessary to effectuate the purposes of the statute. The rule was stated in *People v. McBride*, 234 Ill. 146, in the following language: "The only purpose of the provision of the constitution is to prevent the joining in one act of incongruous and unrelated matters, and the word 'subject' is not synonymous with 'provision.' Any number of provisions may be contained in an act, however diverse they may be, so long as they are not inconsistent with or foreign to the general subject and may be considered in furtherance of such subject. The requirement that an act shall embrace but one subject is not intended to hamper the legislature or embarrass honest legislation, but it is intended to prevent incorporating in an act matters not related to the subject of legislation and of which the title gives no hint. An act may contain many provisions and details for the accomplishment of the legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision."

Counsel has pointed out no valid objection to the validity of the Park acts of 1903 and 1907, and we see none, and as in our view they are not involved in the decision of this case it is unnecessary to discuss them.

A large part of the evidence heard by the master was devoted to the question whether appellee's lots formerly extended farther eastward than the present shore line and had been torn away by violent avulsions of nature. If this were the case, then title to the submerged parts of the lots was not lost to appellee and he might reclaim and re-assert

his title thereto. In considering what is an avulsion, and the rule of law in such cases, this court, in *City of Chicago v. Ward*, 169 Ill. 392, quoted with approval from Angell on Water-courses the following: "Where considerable quantities of soil are by a sudden action of the water taken from the land of one, this is called avulsion; but the ownership is not lost though the surface earth is thus transported elsewhere, and it may be reclaimed and the ownership re-asserted." It would unduly lengthen this opinion to set out the substance of the evidence on this question. It consisted of oral testimony, documentary evidence, maps and plats. Frank C. Taylor, formerly an owner of a portion of the east half of fractional section 5, of which the appellee's lots are a part, and who built a house on the property in 1872; James G. Wilson, agent for the property from 1872 to 1880, and Charles Ecklund, who was caretaker of and lived on the property from 1874 to 1882, testified on behalf of appellee, and their testimony, together with appellee's other evidence, including maps made by engineers purporting to show the former shore line, tended to show that prior to 1877 the shore of appellee's property was considerably farther east than it now is, and that between 1872 and 1877 or 1880 considerable portions of the land were torn and washed away by violent storms. Appellants' evidence tended to contradict this testimony and show that there was no great difference between the shore line prior to 1877 or 1880 and the present shore line. The master found that prior to 1874 the property now owned by the appellee extended much farther east but that the evidence was not sufficient to prove the alleged avulsion. The chancellor found and recited in the decree "that the evidence does not show an avulsion occurred immediately east of the defendant Fahrney's property, and further finds that the defendant Fahrney's land extends to the water's edge when the waters of Lake Michigan are at rest." After a careful examination of the record we are of the opinion

the weight of the evidence tends to support this finding of the decree.

While authority of the State to grant the title to the submerged lands of Lake Michigan to the park commissioners is denied by appellee, it was expressly decided in *People v. Kirk*, 162 Ill. 138, that the legislature did have such authority, and that a grant so made by it vested the title to the submerged lands in the park commissioners. Appellee does not, therefore, own the land over which he proposes to construct piers but said land belongs to and is the property of the park commissioners. What, then, are his rights, as riparian owner, of access over his land to the waters of Lake Michigan? This question has heretofore been three times before this court, (*Revell v. People*, 177 Ill. 468; *Gordon v. Winston*, 181 id. 338; *Cobb v. Commissioners of Lincoln Park*, 202 id. 427;) and as these cases, in our view, are conclusive of the question here involved and as the law was elaborately discussed in two of them, we regard it as unnecessary at this time to enter upon any original discussion, but will merely refer to the manner in which the question arose in those cases and what the court decided the law to be.

In the *Revell case* an information was filed in the name of the People, by the Attorney General, for an injunction to restrain Revell from building piers in the bed of Lake Michigan and to abate piers already built by him. Revell owned land bordering on Lake Michigan and had constructed piers in the lake east from the shore of his land at right angles with the shore and proposed to extend them still farther. The information alleged that Revell had by that means reclaimed land belonging to the State, and claimed the right, as riparian owner, to reclaim more of the submerged land and protect his land from erosion. In his answer Revell denied he built the piers to reclaim land in the lake but alleged it was to protect his land from erosion; denied his piers were purprestures and denied the

right of the State to cause them to be removed. The circuit court decreed that the submerged lands belonged to the State and that the piers built by Revell were purpresures, and he was enjoined from thereafter building any further structure upon the submerged lands. The decree found that the piers already built were not then detrimental to the public interest and would not become so until the State desired to claim and use the submerged lands upon which they stood, and the piers already built were permitted by the decree to remain until the State chose to take possession and use the submerged lands to the water's edge, at which time it was authorized to abate and remove the piers. Cross-errors were assigned by the Attorney General, and the decree was reversed on the ground that while it was in favor of the people it did not go far enough, and the case was remanded, with directions to the circuit court to enter a decree according to the prayer of the information. The opinion is a lengthy one and reviews the law on the subject from an early date to the present time, both in this country and in England. We quote excerpts from the opinion. On page 479 the court said: "The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the State and held by the State in trust for the people. The fee being in the State, the important question presented is whether appellant, without a grant or other authority from the State, had the right to go upon the submerged lands and erect the structures complained of in the information. This State has adopted the common law as it existed prior to March 24, 1606,—the fourth year of James I,—and in the absence of any statute of the State changing the common law in regard to rights of riparian or littoral owners the common law as it then existed must control. Upon an examination of the authorities we think it is clear that the act complained of in the information was

a trespass upon the lands of the State; that the erection of the piers in the lake in front of the appellant's premises was a purpresture." On page 483 the court said: "The appellant had no right to build piers or 'wharf out' into the lake for the purpose of making land or increasing the boundary of his premises, nor had he the right to do any act which would produce that result. As has heretofore been said, the lands covered by the waters of the lake belong to the State, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge, and when he did so an injury was inflicted on the rights of the State, which might be inquired into and abated in a court of equity on the application of the Attorney General."

In *Cobb v. Commissioners of Lincoln Park, supra*, the grant of the submerged land by the act of 1895 to the park commissioners was sustained. In that case Cobb owned a lot abutting on the west shore of Lake Michigan. He filed a bill against the Lincoln Park Commissioners alleging that as riparian owner he had a right to erect wharves out in the waters of the lake to the point of navigability; that the park commissioners claimed title to the submerged land in front of his property and refused to permit him to build a wharf out into the lake and threatened to use their police force to prevent his doing so. The bill prayed an injunction restraining the park commissioners from interfering with complainant in the construction of his wharf. The bill was dismissed on the hearing for want of equity and this court affirmed the decree. The court said: "The only question in this case, as stated by appellant, is whether the owner of land bordering on and adjacent to the waters of Lake Michigan has a right of access from his own property to a point in the lake where the waters are navigable, and whether, in the exercise of this right, he may erect a wharf or pier from his shore line over the submerged lands in the shallow water to the point of navigability in the lake. Appellant insists that the riparian owner has this right of ac-

cess, and that it includes the right to wharf out,—that is, to erect wharves and piers in front of his land,” and again held, as had been previously held in the *Revell* case, that the riparian owner’s right of access from his land to the lake was the right to pass to and from the waters of the lake within the width of his premises as they bordered thereon, but he had no right, by virtue of being a shore owner, to construct piers on the submerged land without the consent of the owner. In the opinion the court cited and quoted from *Revell v. People*, *supra*, and other cases, and said (p. 432): “The property in the dry land or upland being in one person and the property in the submerged land immediately in front thereof being in another, it would seem to be only consonant with legal principles that the consent of the latter must be obtained before any erections can be put on the submerged soil.” And on page 437 the court said: “After a careful reading of the authorities we see no reason to recede from the position taken in the *Revell* case, and are satisfied that by the common law, unmodified by local usage, custom or statute, a riparian owner had no right to build any structures on the submerged lands in front of his own land unless he owned such submerged lands or had a license to do so. The title of the owner of such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water. Such being the common law, it is the law of this State until altered by the legislature.” In both the *Revell* and *Cobb* cases the court cited and quoted with approval from *Shively v. Boulby*, 152 U. S. 1, which is in strict accord with those cases.

In *Gordon v. Winston*, *supra*, the right of the Lincoln Park Commissioners to enjoin the erection of piers upon the submerged lands of Lake Michigan by a shore owner was sustained in a short opinion, in which it was held *Revell v. People* was decisive of the question.

Appellee insists the *Revell* and *Cobb* cases are contrary to the current of authority elsewhere, and also that they are not directly in point upon the question here involved. The case of *Trustees of the Town of Brookhaven v. Smith*, 188 N. Y. 74, is cited as laying down a different and correct rule. If, as contended, that case sustains the right of appellee to build piers over the submerged lands of Lake Michigan, it is in conflict with *Shively v. Bowlby*, *supra*, and the three decisions of this court referred to. We could not follow the *Brookhaven* case without overruling those three decisions, which we are not convinced we would be justified in doing.

Appellee also quotes from *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, the expression, "riparian owners upon navigable fresh water lakes may construct in the shore waters in front of their lands wharves, piers, landings and booms in aid of and not obstructing navigation," and argues this is the last expression of this court and is in harmony with the correct rule. In that case the court was dealing with land bordering upon the Illinois river. In such cases a grant of land bordering on the stream carries title to the center thread of the stream unless the boundary is in some way otherwise determined. The passage quoted was used in view of that situation and stated the law correctly as applicable to the case. It is in nowise in conflict with the *Revell*, *Cobb* and *Gordon* cases. Indeed, the *Revell* case and *Gordon v. Winston* are cited in the opinion with approval. The rule applicable to lands bordering upon a stream was insisted upon by counsel as the proper rule to be applied in the *Revell* case. Upon this question the court said in the *Revell* case (p. 486): "It is, however, suggested in the argument that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the State navigable in fact but not navigable at law, has held the shore owner may wharf out from the shore into the stream, and that the same doctrine

should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they all are predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with *Middleton v. Pritchard*, 3 Scam. 510, it was held in *Ensminger v. People*, 47 Ill. 384, that a riparian owner in the Ohio river having the title to the land between high and low-water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land and make reasonable charges for its use by those navigating the river. The right, however, as is apparent from the rule established in the case, rests upon the ownership of the underlying soil."

Up to the present time appellants have not attempted to destroy appellee's riparian right to pass over his land, within the width of its boundaries, to the waters of the lake. That question, as was said in the *Revell case*, will arise when the appellants undertake to condemn appellee's riparian rights or appropriate the submerged lands upon which appellee's lots abut. This proceeding does not affect or tend to destroy any of appellee's riparian rights.

We are of opinion the circuit court erred in authorizing the construction of the piers by appellee and in enjoining the appellants from interfering with their construction and maintenance by appellee until such time as the submerged land opposite appellee's property is desired to be used by appellants in the plan of park enlargement and extension. The decree is therefore reversed and the cause remanded to the circuit court, with directions to enter a decree dismissing the cross-bill and granting the relief prayed in the original and supplemental bills.

Reversed and remanded, with directions.

THE CITY OF LINCOLN, Appellee, vs. D. H. HARTS *et al.*
Appellants.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. SPECIAL ASSESSMENTS—*extent to which the court's order approving certificate of completion is conclusive.* The order of the county court, under section 84 of the Local Improvement act, approving the certificate made by the board of local improvements concerning the completion and acceptance of the work, is conclusive only as to the fact that the improvement is constructed in substantial compliance with the ordinance.

2. SAME—*void ordinance is subject to direct or collateral attack.* If the ordinance providing for a special assessment is void the court is without jurisdiction to confirm the assessment, and all proceedings based upon the ordinance are void and open to direct or collateral attack.

3. SAME—*ordinance cannot rightfully include the cost of paving street railroad right of way.* While a contract between a city and a street railway company providing that the company shall pave the portion of the street occupied by its tracks is in force the city has no power to provide, by ordinance, for the paving of such strip by special assessment, whether the cost is assessed against the property owners or is embraced in a separate item as public benefits, to be paid by the city in case the company refuses to perform its contract.

4. SAME—*city cannot change character of improvement after ordinance is passed.* Whether the paving of a portion of a street occupied by street railway tracks shall be done by the company under its agreement, which is in force, or by the city cannot be determined by the city after the passage of the ordinance providing for the paving of the street by special assessment but which provides that the cost of paving the strip in question, which is made a separate item, shall be assessed as public benefits, to be paid by the city in case the company refuses to perform its contract.

5. SAME—*when a supplemental ordinance is unauthorized.* A city is without authority, by a supplemental ordinance in a special assessment proceeding, to relieve from taxation any property benefited, by assessing against a part of the property benefited, and the general public, the entire cost of the improvement.

6. SAME—*total public benefits is part of cost of improvement.* The total public benefits assessed must be considered as a part of the entire cost of the improvement in ascertaining the amount to be abated proportionately to the public and the property owners, in case of a surplus.

APPEAL from the County Court of Logan county; the Hon. HOMER W. HALL, Judge, presiding.

BEACH & TRAPP, PETER MURPHY, and BALDWIN & STRINGER, for appellants.

URI KISSINGER, City Attorney, and BLINN & COVEY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal by certain property owners from a judgment of the county court of Logan county overruling their objections to the finding of that court, under section 84 of the Local Improvement act, as to the truth of the certificate of the board of local improvements of the city of Lincoln with reference to the paving of Kickapoo street, in that city, under a special assessment ordinance.

February 7, 1910, the city council of the city of Lincoln passed an ordinance for re-paving the roadway of Kickapoo street from Broadway to Galena street. At the time this ordinance was passed the Lincoln Railway and Light Company was occupying and using the central portion of the street with a single track of its street railway by virtue of an ordinance passed in March, 1891. The last mentioned ordinance provided that when the railway company laid its track upon any street or highway of said city that was paved it should pave it in like manner and with like material as that in use, and that when the city should cause any such street to be re-paved the street railway company should re-pave its portion of the street in the same manner. The ordinance further provided that if the street railway company should fail or neglect, upon sixty days' written notice, to pave its right of way, the city might remove the tracks from the street and pave that part also. The estimate as to the cost of this pavement in the local improvement ordinance was divided into two items, the first, \$18,-

623.20, the cost of the paving exclusive of the street railway right of way, and the second, \$4705.10, the cost of paving said right of way. The ordinance further provided that the board of local improvements should give said street railway company sixty days' notice, in writing, of the time fixed for beginning the work of the improvement, and if it should neglect or refuse to begin the work within the time fixed, then the city should remove the track from said street and improve said right of way at the same time and in the same manner as the remainder. The ordinance further provided that there should be assessed against and paid by said city of Lincoln, as public benefits, the cost of paving said right of way; that if said railway company should elect to improve the right of way as specified, then said assessment against the city for said right of way should be abated. Under the petition filed in the county court the president of said board of local improvements, as commissioner, spread the assessment, apportioning to private property \$14,872, and to the city, as public benefits, \$8456.30, stating that of this last named amount \$4705.10 was the cost of paving the right of way of said railway company. Said special assessment was thereafter confirmed by the county court and a contract let for the work. The contract is not shown, but it seems to be conceded that it covered the work for the entire width of the street. There was no assessment against the railway company. Thereafter, June 6, 1910, the city council passed an ordinance wherein it recited the history of the granting of the franchise to said railway company in 1891, the passage of the local improvement ordinance for paving the street, and the giving of the notice to said company to pave the right of way; that said sixty days had expired and the company had refused and neglected to improve its right of way, but had stated to the city authorities that it was not financially able to do so and would be compelled to permit the city to remove its tracks on said street; that said street car line on said street, by

reason of the fact that it connected with the railway stations, was believed by the public authorities to be of general public benefit and that the earnings of said company were not sufficient to warrant the expense of paving said right of way. The ordinance then proceeded to provide that if said railway company should at its own expense re-lay and re-construct its track in said street between Broadway and Galena streets, using for the improvement new white oak ties and new rails weighing not less than sixty pounds to the yard, so constructed that the top should conform to the finished pavement of the street, then the city would waive the right to remove said track from said street by reason of the refusal and neglect of said company to pave its right of way, and that said track so re-laid and re-constructed should remain in said street and the street car service be continued, and that the expense of grading and paving said right of way should be paid by the city of Lincoln from its general funds in installments and by bonds issued as provided by said local improvement ordinance. Before this last ordinance went into effect certain property owners abutting on said street, by written notice, protested to the city authorities against making the above arrangement with the street car company and served a copy of said protest on the contractor. After the last mentioned ordinance was enacted it was duly accepted by the railway company, said company re-laying and re-constructing its track in accordance with the terms thereof and the pavement as to said right of way being laid by the contractor along with the rest of the pavement in the street. After the completion of the pavement as provided for in the contract, a petition was filed in said county court, together with a certificate of the board of local improvements that the paving had been completed in the manner and with the materials specified in the original ordinance. Said certificate stated that the actual cost of said pavement, exclusive of said right of way of the railway, including interest on bonds, was \$18,064.50.

leaving an excess of the estimated cost over the actual cost of \$558.70; that the actual cost of improving the street railway right of way was \$4485.56; that said last named amount had been paid to the contractor out of the city's general funds; that the board asked that the original estimate for paving the railway right of way (\$4705.10) should be deducted from the assessment against the city, and that the excess of assessment over the cost of said improvement, (exclusive of cost of right of way,) namely, \$558.70, be abated and the judgment reduced proportionately to the public and the private property owners; that said improvement was completed, as provided for in the ordinance and specifications, September 6, 1910. After notice fixed by the court certain property owners, including these appellants, filed twenty-two objections to the certificate and the application of said board of local improvements for its approval. These objections, in substance, urged that the original ordinance was void in providing for the improvement of the entire street, including the right of way, without assessing any part of the cost against said company, and that the subsequent or supplemental ordinance was a fraud, in law, against the objectors and each of them. The objection was also made that the improvement had not been made in compliance with the original ordinance and specifications.

Counsel for appellee insist that this appeal should be dismissed; that the judgment of the court approving the certificate was conclusive on all parties, no appeal or writ of error being provided for under the statute. If the sole question here were whether the improvement had been completed in accordance with the contract the decision of the lower court on that point would be final, (*People v. Martin*, 243 Ill. 284,) but this court has held in *City of Peoria v. Smith*, 232 Ill. 561, that the finality of the court's order under said section 84 referred only to the court's finding that the improvement conforms substantially to the

requirements of the original ordinance. (*City of Chicago v. Smale*, 248 Ill. 414.) In this case the objectors offered no evidence that the improvement did not correspond to the requirements of the original ordinance, except that the railway was still in the street, and that the pavement as to its right of way had been put down by the city and not by the company.

It is, however, urged that both the original and subsequent ordinances are void. If the original ordinance is void the court had no jurisdiction and all the proceedings based upon the ordinance are consequently void. A legal and sufficient ordinance is the foundation of a valid assessment. The question of the validity of an ordinance is jurisdictional. (*O'Neil v. People*, 166 Ill. 561; *Culver v. People*, 161 id. 89.) A void ordinance is subject to a direct or collateral attack whenever its authority is invoked in a judicial proceeding. Municipal authorities must be able to show a warrant to tax which will justify their action. The authority must be followed strictly when seeking to levy an assessment. The power must be clearly given. It cannot be found in a general grant but must be conferred specially. "The mischief of a strict construction is easily obviated by the legislature, but the mischief of a liberal construction may be irremediable before it can be reached." (1 *Cooley on Taxation*,—3d ed.—469; *Burroughs on Taxation*, 472; 1 *Page & Jones on Taxation by Assessment*, sec. 234; 2 *Desty on Taxation*, 1234.) Special assessment proceedings in this State are purely statutory and unless authorized by the statute are void. (*Davis v. City of Litchfield*, 145 Ill. 313; *Waite v. Green River Drainage District*, 226 id. 207.) The original ordinance provided for paving the entire street, including the right of way of the railway. That the estimate was separated into two items does not change this fact. It is manifest from this record that the city authorities anticipated that the city railway company would not comply with the

original franchise ordinance and pave the right of way. The company was obligated by its franchise ordinance to do this paving, and the city authorities could not by the local improvement ordinance make that obligation more binding. The usual practice in this State is to make no provision as to paving the right of way of street railways which are under contracts similar to this. (*Billings v. City of Chicago*, 167 Ill. 337; *Chicago and Northern Pacific Railroad Co. v. City of Chicago*, 172 id. 66; *Kuehner v. City of Freeport*, 143 id. 92.) The practice in other jurisdictions differs on this question, (1 Page & Jones on Taxation by Assessment, secs. 603, 604,) but a recitation in the local improvement ordinance to the effect that the street railway right of way is required to be paved under the original franchise ordinance by the street railway company, while unnecessary, would not invalidate the ordinance. While the contract with the railway company as to paving this strip remains in force the city could not provide for paving it by special assessment. *City of Chicago v. Newberry Library*, 224 Ill. 330.

Counsel for appellee admit the property owners could not have their assessments increased to pay for paving this strip, but argue that the rule does not apply when the cost of paving such strip is paid for by the city as a part of the public benefits. We cannot agree with this contention. This court held in *City of Chicago v. Cummings*, 144 Ill. 446, that if an ordinance provided that a railway company should grade, pave and keep in repair a portion of the street occupied by it, only the cost of grading and paving the part outside of the sixteen feet occupied by the railway should have been assessed against the property benefited "or required to be paid by general taxation." The contract requiring the street railroad company to pave the portion of the street occupied by it is regarded in the decisions as an equivalent for the assessment. (*West Chicago Street Railroad Co. v. City of Chicago*, 178 Ill. 339.) The contract

is upon a good consideration. As long as the railway was operated or the company not released from its obligations the cost of paving the strip in question should have been left out of the assessment. (*Sawyer v. City of Chicago*, 183 Ill. 57.) In this last case the street railway company constructed its tracks in a certain street as authorized by its franchise ordinance and operated thereon for several years. Thereafter a sewer was built in the street, at which time the tracks were taken up. Later a local improvement ordinance was passed for paving the street, the entire cost of improving being levied against the adjoining property owners, as at that time the tracks of the street car company had not been re-laid. It was argued that the street car company had abandoned its franchise. The court said (p. 60): "For aught that appears the street railway company has all the rights in the avenue that it ever had and may re-lay its tracks at any time. * * * It would be a manifest wrong to the property owners to compel them to pay for this improvement and after its completion have the street railway company re-lay its tracks and take the benefits." *City of Chicago v. Ayers*, 212 Ill. 59.

On principle and authority, so long as a contract of this kind is in force we can see no distinction, as to relieving the street railway company from carrying out its contract, whether the payment for the paving of the right of way is to be by special assessment on private property or from public benefits. Either plan would be a grave injustice and contrary to sound public policy. When the local improvement ordinance was passed the contract with the street railway company was still in force. This being so, the city had no authority to provide in this ordinance that this strip should be paved and charged to the city as a part of the public benefits. The assessment, including the private benefits, the cost of this strip and the remaining portion of the public benefits, was divided into ten installments in the assessment roll, and while the supplemental or subsequent

ordinance provided that it should be paid out of the general funds in installments and by bonds, as were the remaining costs of the improvement, it is apparent from this record that for some reason not shown the contractor was paid the entire amount for paving this strip on or before September 7, 1910, and was not paid by bonds and installments, as he was for the rest of the improvement. The total public benefits must necessarily be considered as a part of the entire cost of the improvement in ascertaining the amount to be abated proportionately to the public and the private property owners. It follows that if the original ordinance was valid the amounts abated to the property owners by the certificate were too small. If it be argued that the ordinance was conditional in its terms and did not provide that the city should make this improvement unless the street railway company failed to do it, the answer then must be that the description of the improvement in the ordinance is uncertain and indefinite. Moreover, the decision as to whether the work should be done by the city or the railway company could not be made after the passage of the original ordinance. The municipal authorities cannot by subsequent action change materially the nature of the improvement provided for in the original ordinance, as to its grade, location, size or character. *Whaples v. City of Waukegan*, 179 Ill. 310; *Church v. People*, 174 id. 366; *City of Paxton v. Bogardus*, 201 id. 628; *Boyn-ton v. People*, 159 id. 553.

Under the supplemental ordinance appellee was without authority to relieve from taxation any property benefited by assessing against a part of the property benefited and the general public the entire cost of the improvement. *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co.* 249 Ill. 260.

It must be held that the original ordinance was void in providing for the paving of this strip by special assessment and charging the same as a part of the public benefits while

the contract with the railway was still in force. *Village of Madison v. Alton Traction Co.* 235 Ill. 346; *American Hide and Leather Co. v. City of Chicago*, 203 id. 451; *City of Chicago v. Nodeck*, 202 id. 257; *City of Chicago v. Newberry Library*, *supra*.

The county court was without jurisdiction to confirm the assessment or enter the order herein appealed from.

The judgment of the county court will be reversed.

Judgment reversed.

THE PEOPLE *ex rel.* William H. Kidd *et al.* Defendants in Error, *vs.* JOHN E. CROWLEY *et al.* Plaintiffs in Error.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. DRAINAGE—*when parties cannot rely on objection that meetings to organize district were held outside its limits.* Land owners who participate in the organization of a drainage district can not, after standing by until assessments are levied, the contract is let and large expenditures are incurred, attack the organization of the district upon the ground that the meetings of the highway commissioners to organize the district, in which they participated, were held outside the limits of the district.

2. SAME—*when land owners cannot question election of drainage commissioners.* Land owners who participate in the election of drainage commissioners and recognize its validity by thereafter taking part in the organization of the district and the subsequent proceedings, cannot, after the work is practically completed, attack the election of the commissioners upon the ground that the law under which the election was held had then been repealed, particularly where the law was re-enacted at a later period and the commissioners elected thereunder.

3. QUO WARRANTO—*not every departure from law in organizing drainage district will warrant judgment of ouster.* Not every departure from the law in the organization and conduct of a drainage district or the use of its franchises will justify an order, in a *quo warranto* proceeding, ousting the commissioners from office.

4. SAME—*remedy by information in quo warranto is not a matter of absolute right.* The remedy by an information in the nature of *quo warranto* is not a matter of absolute right, and if the in-

terest of the People is merely nominal the court may decline to enter a judgment of ouster upon the ground of acquiescence or unreasonable delay by the persons complaining or from considerations of public interest or convenience.

WRIT OF ERROR to the Circuit Court of LaSalle county;
the Hon. RICHARD M. SKINNER, Judge, presiding.

CRAIG & CRAIG, and BUTTERS & ARMSTRONG, for plaintiffs in error.

CHARLES S. CULLEN, State's Attorney, (LESTER H. STRAWN, and L. W. BREWER, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

On leave granted by the circuit court the State's attorney of LaSalle county filed an information in the nature of a *quo warranto* on August 22, 1905, alleging that the plaintiffs in error held and executed, without warrant, the offices of commissioners of an alleged drainage district of the town of Ophir, in that county. June 22, 1906, by leave of court, additional counts were filed to the information, in which it was charged that the said plaintiffs in error were usurping certain franchises. Various pleas, replications, demurrers and certain motions were filed, and the cause was many times set for trial and many times passed or continued when reached for trial. Finally, on April 6, 1910, by leave of court, plaintiffs in error filed two pleas, which were substantially identical in form except as to the conclusion. The trial court sustained demurrers to said pleas on said last mentioned date, and entered an order finding that the plaintiffs in error were guilty of usurping, without authority, the franchises and offices described in said information and that the supposed drainage district was without any franchise or legal existence; that plaintiffs in error be forthwith ousted from exercising the offices of

drainage commissioners and that each pay a fine of one dollar. This writ of error is sued out to reverse that judgment.

The pleas upon which the case was disposed of set out the steps taken in the organization of the drainage district, alleging that December 17, 1904, a petition was addressed to the drainage (highway) commissioners of the town of Ophir asking for the organization of the district; that at a meeting held in the town clerk's office December 28, 1904, by said highway commissioners, affidavits were filed stating that the majority of the adult land owners of the lands comprising the proposed district had signed the petition, representing more than one-third of the lands; that said meeting was adjourned by the said commissioners to meet January 11, 1905; that in the meantime the commissioners personally examined the proposed drainage district and employed a civil engineer to make a survey and an estimate of the costs; that they met at said adjourned meeting January 11, 1905, and again adjourned to January 25, 1905, and that at said last mentioned meeting they entered an order declaring said drainage district fully organized and describing its boundaries; that on February 23, 1905, the town clerk called an election to be held March 1, 1905, for the election of drainage commissioners, at which election William H. Kidd, one of the relators, received the same number of votes as the plaintiff in error John E. Crowley; that Kidd and Crowley cast lots, and Crowley drew the lot entitling him to be declared elected; that all of said relators were present, either in person or by attorney, at said meeting of December 28, 1904, and made no objections to the legal sufficiency of said petition; that in May, 1905, the right of way across the lands of Levi Carr, one of the relators, was condemned, and on May 9, 1905, the release for the right of way was procured across the lands of relators Marshall Wallace, Louis L. Wallace and Charlotte Davis; that June 17, 1905, according to the statute,

the commissioners made a classified roll of all lands in said district, and that thereafter, on July 10, 1905, pursuant to statutory notice, a meeting was held in said drainage district to hear objections to such classification, and that all of the relators were present, in person or by attorney; that all objections were then withdrawn and all of said relators expressed themselves as being in favor of carrying out said improvement and publicly announced that they had no objections to the classification and ratified and approved the action of the commissioners; that thereafter an assessment of lands of said district was made by plaintiffs in error; that all of said assessments have been voluntarily paid except by the relators, and that relators Charlotte Davis and Fred T. Davis have voluntarily paid a portion of their assessments and Edward J. Brady the whole of his; that long prior to the commencement of this suit the respondents had duly advertised for bids for digging and constructing the ditch and had publicly let a contract for the work at about \$27,000; that the contractor had given his bond and expended in and about his work about \$10,000 prior to the commencement of this proceeding; that the plaintiffs in error had paid said contractor, prior to this suit, over \$3000, and that prior to November 28, 1906, (when all of the relators in this suit except Kidd were added to the petition,) five and one-eighth miles of the seven and one-half miles of said ditch had been completed and that the contractor had been paid on his contract upwards of \$14,639, leaving a balance due him of several thousand dollars; that all the lands in the district have been benefited to the extent of \$30 an acre by said drain; that the State's attorney of LaSalle county has only taken a nominal part in these proceedings, the same being instituted at the sole request of the relators, and being prosecuted by them at their own expense and for their individual benefit in attempting to escape their just proportion of the cost of the improvement.

In view of the conclusions we have reached in this case we shall not find it necessary to discuss the various points raised on the pleadings in this case. The existence of the district is disputed because the meetings of the highway commissioners held on January 11 and 25, 1905, to organize the district were not held within the limits of the district. The title of the drainage commissioners is disputed on the ground that they were chosen under the provisions of section 15a of the Farm Drainage act, which had been repealed. Conceding, for the purposes of this case, that these questions are raised by the pleadings, we are disposed to hold that the relators are estopped by their own acts from raising them. We think it is apparent from this record that the relators did not rely on either of these points until after they had filed their additional counts, in June, 1906. We think it is also apparent from the pleadings that these proceedings have been carried on largely in the interest of private parties and that the interest of the public is little more than theoretical. Manifestly, from the facts set out in the pleas the only relator who was such at the time the original petition was filed (William H. Kidd) was a candidate for drainage commissioner at the first election for those officials in March, 1905. While the pleadings are not entirely satisfactory in form on that question, we conclude from them that all the relators took part in this election. The same conclusion must also be reached with reference to the relators attending the meetings held in July and stating that they were satisfied with all the proceedings up to that point. Obviously, all of the relators were acquainted with the entire proceedings that had been taken and raised no objection of any kind up to that time, and none of them objected until the contract had been let for the entire work and (except Kidd) until a substantial part of it was completed and large sums of money paid thereon and obligations assumed for the remaining portion. The relators knew as well as did plaintiffs in error that the

meetings in January, 1905, were held outside of the district. We are compelled to conclude from the pleadings that that question was not raised until the work was practically completed, and then there was a difference of opinion as to whether such meetings were required to be held in the district, until this court decided the point in *People v. Carr*, 231 Ill. 502. At most, this objection does not in any way affect the substantial merits of the case. Sound public policy forbids that those who have participated in such meetings should thereafter be permitted to question the legality of the organization of a district of this kind. *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 id. 132.

It is, however, insisted that under the decisions of this court in *Patton v. People*, 229 Ill. 512, and *People v. Morrell*, 234 id. 47, said section 15a, under which the election of drainage commissioners was held, was not in force at the time of this first election, and that the relators could not be estopped by participating in an illegal election. It was held in *People v. Maynard*, 15 Mich. 463, that the recognition, by parties interested, of a municipal corporation organized under an act of doubtful constitutionality would not permit such parties to inquire, long after, into the regularity of such organization. (See, also, *State v. Village of Harris*, 13 L. R. A. (N. S.) [Minn.] 533, and note; *Bannock County v. Ball*, 101 Am. St. Rep. [Idaho] 140, and note.) Regardless of whether there was any law for such an election, the recognition by all the parties of the legality of the district was plainly shown by their taking part in its organization and subsequent proceedings. In this connection it may be noted that section 15a was re-enacted as an emergency law on February 27, 1907, (Laws of 1907, p. 273,) and that thereafter the present drainage commissioners have all been elected under said law.

Counsel for defendants in error have urged, apparently for the first time in their briefs in this case, that the organization of the district was void (*People v. Highway Comrs.*

240 Ill. 399,) because one of the highway commissioners signed the petition for the organization of the district and also made an affidavit that the petition contained the required number of signers, and thereafter found that the affidavit was made by a credible witness. Without passing on the point whether this would be a valid objection if raised in apt time, clearly, under the authorities, the relations cannot raise it at this late hour. The reasoning in *Drainage District v. Smith*, 233 Ill. 417, *Vandalia Drainage District v. Hutchins*, 234 id. 31, and cases cited, is in point here.

Many relations, both public and private, are so involved in a proceeding of this nature that each case must be largely decided on its own special and particular facts. Not every departure from the law in the organization and conduct of the proceedings of the district or the use of its franchises will justify such an order as was entered by the trial court in this case. While the public authorities will not be barred, either by *laches* or the acquiescence of individuals, where it does not appear that the information is filed exclusively for the benefit of private interests, still this court has frequently held that unreasonable delay or acquiescence on the part of the persons complaining, as well as considerations of public interest or convenience, will justify the refusal of the court to proceed to judgment, although no statute of limitations has intervened. (*People v. Lease*, 248 Ill. 187; *People v. Schnepf*, 179 id. 305; *People v. Hanker*, 197 id. 409; *People v. Anderson*, 239 id. 266; *People v. Hepler*, 240 id. 196.) The rule in *quo warranto* proceedings is the same as it is in *certiorari*. The remedy in either case is not a matter of absolute right. (*People v. Schnepf*, *supra*; *People v. Hanker*, *supra*.) In a *certiorari* case, wherein the facts as to *laches* or estoppel were no stronger than here, the court held that it would be an abuse of its sound legal discretion and of great public detriment to quash the proceedings, as the errors, at the most, were

technical and harmless and were not shown to be such as would cause substantial injustice to anyone. (*Deslauries v. Soucie*, 222 Ill. 522.) Such is the situation here. After the participation of all the relators in the preliminary organization assessments were levied, liabilities incurred and contracts to large amounts were entered into before any steps were taken to inquire into the legality of the organization of this district. If the facts are as set out in these pleas the acquiescence of the relators in the proceedings bars them from raising the questions of which they now complain. On this record the public interest and convenience also compel the conclusion that the trial judge should have overruled the demurrer to the pleas.

The judgment of the circuit court will therefore be reversed and the cause remanded to that court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

THE PEOPLE *ex rel.* Thomas L. Aldridge *et al.* Plaintiffs in Error, *vs.* ROBERT M. RENDLEMAN *et al.* Defendants in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. *QUO WARRANTO*—the court is vested with wide discretion in matter of granting or denying leave to file an information. Upon application for leave to file an information in the nature of *quo warranto* for the redress of the private wrongs of the relators the court is vested with a wide discretion, and may consider the necessity for filing the information and circumstances or facts showing to the court that the relators have been guilty of *laches* in applying for relief.

2. *SAME*—court may deny leave to file information if there has been prejudicial delay by relators. Upon application for leave to file an information in the nature of *quo warranto* to redress private wrongs, if the relators have not acted in apt time and the respondents have expended money or incurred liabilities which might have been saved by prompt action, the court may, in its dis-

cretion, deny leave to file the information without considering the matters set up in the information.

3. DRAINAGE—*when judgment denying leave to file information in quo warranto will be sustained.* A judgment denying leave to file an information in the nature of *quo warranto* against the commissioners of a drainage district will be sustained on appeal where the relators have allowed nearly four years to elapse since the district was organized, during which time much work was done and money expended, before attacking the organization of the district upon grounds they might have availed themselves of by proper objection at the time the district was organized.

WRIT OF ERROR to the Circuit Court of Union county;
the Hon. A. W. LEWIS, Judge, presiding.

WILLIAM D. LYERLE, State's Attorney, (R. J. STEPHENS, of counsel,) for plaintiffs in error.

A. NEY SESSIONS, and JAMES LINGLE, for defendants
in error.

Mr. CHIEF JUSTICE VICKERS delivered the opinion of
the court:

William D. Lyerle, State's attorney of Union county, presented to the circuit court a petition for leave to file an information in the nature of a *quo warranto* against Robert M. Rendleman and Samuel F. Davie, of Union county, and Thomas J. McClure, of Alexander county, to require them to show by what authority or right they claimed to hold and execute the office of commissioners of Clear Creek Drainage and Levee District of the counties mentioned, and by what right they claimed that said district had a legal existence and a right to hold and execute the franchise of a corporation and to exercise the rights and privileges of a drainage district. The petition was presented on the information and relation of a number of citizens and land owners in said district and was verified by the oath of a number of the relators. The petition was accompanied by

a copy of the proposed information, which is in three counts. Upon the presentation of the petition, on June 21, 1910, a rule to show cause by the following Monday was entered against the defendants. In response to the said rule the defendants entered their appearance, and on a hearing before the court on June 28 three affidavits, together with oral and documentary evidence, were submitted by the respective parties to the court. On July 1 the court entered an order refusing leave to file the information and dismissed the petition and adjudged the costs against the relators. The relators excepted to the order and judgment of the court and preserved by the bill of exceptions all matters connected with the hearing of the petition, and have sued out this writ of error for the purpose of obtaining a review of the order refusing leave to file the information.

The petition recites that said pretended drainage district was organized upon a petition presented by C. E. Anderson and 89 other persons to the March term, 1907, of the county court of Union county, alleging that the petitioners constituted a majority of the land owners of the proposed district and represented one-third or more of all the lands embraced therein, and praying for the organization of the territory described in the petition into a drainage and levee district. The petitioners in the proceeding at bar charged that the petition to organize the drainage and levee district did not contain a description of the proposed starting points, route and terminus of the work thereby proposed, and that said petition did not contain a sufficient description of the lands affected by the proposed district and did not give the names of the owners thereof, and it is further alleged that a majority, in numbers, of the land owners of the district did not sign the petition to organize. It is also alleged that the county court acted, in the organization of the said district, without sufficient and proper notice being published or given, as required by the statute. It is charged in the petition that at the date of filing the petition for the organi-

zation of the drainage district Ezekiel Moore was an owner of land located within the boundaries of the proposed district; that said Moore then resided in Jackson county; that no notice of any kind was sent to him within three days after the first publication or at any other time, and that said Moore had not entered his appearance to said petition or proceedings thereon. The petition alleges that at the May term, 1907, a hearing was had in the county court and an order entered granting the prayer of the petition and appointing respondents herein commissioners of Clear Creek Drainage and Levee District. It is alleged further that the said commissioners assumed the powers, privileges and prerogatives of drainage commissioners, and that in January, 1908, the said commissioners submitted to the county court a report, accompanied by maps, profiles, etc., making estimates and giving descriptions of certain work by said commissioners laid off and proposed, the cost of which, including incidental expenses, they estimated at \$225,512.81; that afterwards, in May, 1908, an amended report was filed by the commissioners in which the estimated cost of the proposed work was reduced to \$225,000, which said amended report was then approved and confirmed by the court and an order of court entered declaring the district, with certain boundaries in said order set forth, duly established as provided by law; that on December 27, 1909, the commissioners filed their roll of assessments of benefits and damages, by which they distributed and apportioned to the various tracts and parcels of land, including railroads and plankroads, the aggregate sum of \$285,000, which exceeded the estimated cost of the proposed work \$60,000; that thereupon said commissioners caused notice to be published of their intention to apply to the court on January 17, 1910, for the purpose of having a jury empaneled to consider the assessment roll aforesaid; that on February 23, 1910, the commissioners also filed their petition to condemn land for a right of way for levees and ditches. The petition avers

that after the empaneling of a jury to consider the assessment roll in January, 1910, the commissioners withdrew the assessment roll and procured a discharge of the jury, and thereupon made material alterations in the plans, specifications and estimates for the proposed work without having another petition signed by the land owners or a majority of them, and it is alleged that the aggregate estimated cost of the work as shown by the last report was \$330,000; that said commissioners afterwards filed another roll of assessments of benefits and damages and distributed and apportioned to the several tracts of land in said district said sum of \$330,000 and annual benefits of \$3300, and caused notice to be again published of their intention to have a jury empaneled for the purpose of considering the assessment roll as finally corrected. It is also alleged that an amended petition for condemnation of right of way was filed on November 1, 1909, and that respondents are insisting upon their right to proceed to have said assessment roll confirmed and to condemn a right of way for ditches and levees.

The foregoing statement contains the substance of the averments of the petition, upon which the court entered a rule on the respondents to show cause against petitioners for leave to file an information. Upon a hearing of the petition the court considered, among other things, the affidavit filed by Mr. Sessions, who testified that he is the owner in fee simple of more than 450 acres of land within the boundaries of the proposed drainage district; that he is an attorney for the commissioners of said drainage district, and that he is familiar with the physical situation of the district as well as the various proceedings that have occurred in connection with the organization of the same. The affidavit of Mr. Sessions gives a detailed history of the proceeding from the time the original petition for the organization of the district was filed down to the present, and sets out at large copies of the petition, notice and vari-

ous orders of the court made in connection with the organization of this drainage district. The affidavit shows that there is a total of 39,816.59 acres of land within the boundaries of the proposed district; that a petition was duly presented to the county court praying for the organization of a drainage and levee district, to be known as Clear Creek Drainage and Levee District, on March 16, 1907; that said petition contained a description of the boundaries of said district, and set up facts from which it appears that all of the lands within said district require embankments and grades to protect them from overflows from the Mississippi river and tributary streams, and require ditches to carry off the water, and pumps and machinery and other apparatus for the purpose of relieving said lands from overflow; that with the said petition was filed a paper entitled "Clear Creek Drainage and Levee District.—Names of land owners and acreage," which said paper is known in the record as "Paper A" and contains the names of 196 persons as owners of land within said district, together with the acreage of each set opposite the respective names of such owners. It also appears that a notice was published in *The Talk*, a newspaper published at Anna, in Union county, and that said notice was published for three successive weeks, the last insertion thereof being on the 5th day of April, 1907. A copy of said notice is recited in Mr. Sessions' affidavit, from which it appears that all persons were duly notified that the petitioners were asking for a hearing on said petition at the May law term of the county court of said Union county, on the second Monday in May, 1907. Said notice contains a copy of the original petition and is signed by a number of petitioners as a committee. It also appears that a number of the relators in this proceeding appeared and participated in various proceedings had in court in connection with the organization of this district. The petition for the organization of this district was filed March 16, 1907. Notice of a hearing was

published in April and the hearing was had in May of said year, when the court appointed the commissioners and entered an order declaring the district duly organized. At the time this order was entered in 1907 it is stated in the affidavit of Mr. Sessions that the total costs that had been incurred at that time did not exceed \$25 or \$30. At the time the application for leave to file the information was made, in June, 1910, the costs and expenses incurred for which the district was indebted were between \$7000 and \$8000.

In the view that we have of this case it will only be necessary to consider one question. Upon an application for leave to file an information in the nature of *quo warranto* the court is vested with a wide discretion, and may consider the necessity of filing the information and any circumstances or facts which are brought to the court's attention which show that the relators have been guilty of *laches* in applying for relief. (*People v. Schnepf*, 179 Ill. 305.) In a case where the relators have not applied in apt time, and during the delay the respondents have expended money or incurred liabilities which might have been saved by a prompt action, the court may properly, in the exercise of its discretion, refuse to enter into a consideration of the informalities set up in the information and deny the leave to file such information solely because of the prejudicial delay in applying for relief. (*People v. Hanker*, 197 Ill. 409; *People v. Hepler*, 240 id. 196; High on Ex. Legal Rem.—2d ed.—sec. 659.) The rules announced in the foregoing authorities apply to all cases where the information is presented by relators who are seeking to redress a private wrong. There is a distinction in this respect between cases that are presented on the information of the Attorney General or State's attorney for the redress of a public wrong, and those that are prosecuted on the relation of private persons, and where the people are merely the nominal prosecutors. (High on Ex. Legal Rem. sec. 652.)

The irregularities in the organization of this drainage district that are set up in the petition relate to matters that existed at the time the court entered an order confirming the organization of the district. Knowledge of these supposed defects must have been acquired by the relators in the early stages of the organization of the district. At all events, they were notified in the manner required by the statute, and they must be presumed to have had knowledge of the irregularities upon which they relied. Nearly four years elapsed after this district was organized before the relators applied for leave to file this information. During that time the affidavits filed in opposition to the motion show that an expense of about \$8000 has been incurred in connection with the organization of this district. There has been much labor expended, and in addition to the money there has been a vast amount of work done which is not represented by the money expended. This circumstance was entitled to great weight in determining whether the court, in the exercise of its discretion, would allow the information to be filed. Without reference to the other questions, we are of the opinion that the decision of the court below may be sustained entirely on the ground that the application to file this information was not made in apt time. Relators having been notified, in the manner required by the statute, of the time and place when the petition to form this district would be considered, might have appeared at that time and urged the matters now complained of as objections to the organization of the district. Not having availed themselves of such remedy and having waited until the district has been organized and expended a large amount of money, the court did not abuse its discretion in refusing leave to file this information, and its judgment will accordingly be affirmed.

Judgment affirmed.

ANNA CLANCY *et al.* Appellants, *vs.* J. E. CLANCY *et al.*
Appellees.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. *WILLS—rule where the description of property is only partly true.* Where the description of property intended to be devised by a will is true in part and false in part, the devise may be sustained if by eliminating the false description enough remains to identify the subject of the devise, but nothing can be substituted in place of the description stricken out.

2. *SAME—when misdescription cannot be aided.* Where a testator owning the south-east quarter of the north-west quarter of a certain section, but owning no land in the north-east quarter, devises the "south one-half of the west one-half of the north-east quarter" of said section, the description cannot be aided, without reforming the will, to make it apply to the land owned in the north-west quarter of said section.

3. *SAME—when devise may be sustained in part.* Where a testator owns the north one-half of the west one-half of a certain quarter section and the whole of the east one-half of said quarter section, his devise of the "west one-half and north one-half of the east one-half" of said quarter section will be upheld as devising the forty acres which he owned in the west one-half of said quarter and also the north one-half of the east one-half of said quarter, but the south one-half of the east one-half of said quarter must be held to be intestate property.

APPEAL from the Circuit Court of Champaign county;
the Hon. SOLON PHILBRICK, Judge, presiding.

SCHAEFER & DOLAN, for appellants.

H. I. GREEN, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

This is a bill in chancery filed by appellants, the widow and four minor children of Thomas Clancy, deceased, who died testate October 29, 1909, leaving the appellant Anna Clancy, his widow, and the other appellants, Agnes, Margaret, Annie and Alice Clancy, his minor children. The

widow was the second wife of the testator and the four minor children mentioned were his children by her. The executor of the will was also a party complainant. Seven children by a former marriage, all adults, survived the testator and they were made defendants to the bill. The bill alleged there were latent ambiguities in the will, and that it was necessary for the court to construe it so that its true intent and meaning might be ascertained and the will and intention of the testator given effect.

At the time of his death Thomas Clancy owned a home, where he resided, in the city of Champaign, personal property worth about \$2000 and a farm of one hundred and sixty acres in Champaign county. By the first clause of his will he gave his wife all his personal property and the homestead in the city of Champaign in fee simple. The second and third clauses of the will are as follows:

"Second—I also will to my wife, Anna Clancy, the use of the following described property for the term of thirteen years: The south one-half of the west one-half of the north-east quarter of section four (4), also the west one-half and north one-half of the east one-half of south-west quarter of section four (4), all in township eighteen (18), range eight (8), east of the third principal meridian, in Champaign county, Illinois, she to pay all taxes and assessments that may be levied against said land as the same become due, she to have all the remainder for her and the minor children's support.

"Third—After the said thirteen years have expired, I will that the executor of this my last will and testament shall sell the above described land, and after paying all costs and any other claims against my estate the remainder to be divided as follows: To my daughter Mary Ann Doney \$800; to my son J. E. Clancy \$800; to my son John P. Clancy \$800; to my son M. F. Clancy \$800; to my daughter Elizabeth Brennen \$800; to my daughter Lena Shikes \$800; to my son Thomas Clancy \$800. The

remainder I will to my wife, Anna Clancy, to have during her lifetime; after her death it shall be divided as follows: To my daughter Agnes Clancy one-fourth; to my daughter Margaret Clancy one-fourth; to my daughter Annie Clancy one-fourth, and to my daughter Alice Clancy one-fourth. Should either of the last named four children die before receiving their part of said estate, then their part to be equally divided between the survivors of the four younger children."

The bill avers Thomas Clancy owned the south-east quarter of the north-west quarter, the east one-half of the south-west quarter and the north-west quarter of the south-west quarter of section 4, township 18; alleges he intended by his will to devise it all to his wife for thirteen years for the support of herself and four children until the youngest should become of age, and at the end of said period of thirteen years all of it was to be sold by the executor, and after deducting the amount of the debts against the estate, and costs, the proceeds were to be divided as specified in the will. Defendants, appellees here, answered the bill, denying that it appeared from the will the testator intended to dispose of the whole one hundred and sixty acres, as alleged in complainants' bill; denying there was any latent ambiguity in said will, and denying the authority of a court of equity to construe it so as to give the widow the whole farm for thirteen years, after which it was all to be sold by the executor and the proceeds distributed. The answer averred the testator disposed of only sixty acres of the farm and that the remaining one hundred acres were intestate property. The defendants filed a cross-bill asking for partition of the one hundred acres alleged to be intestate estate among all the children of said Thomas Clancy, deceased. The cause was referred to the master in chancery upon both the original and cross-bills. After hearing certain proof the master reported that Thomas Clancy did not, at the time of his death nor at any time during his lifetime,

own the land described in the will in the north-east quarter of said section 4; that said Thomas Clancy intended by his will to devise to his widow for thirteen years, to be then disposed of as provided in said will, the one hundred and twenty acres he owned in the south-west quarter of section 4, and that the words "north one-half of" should be stricken out of the description of the land devised in that quarter section, so that the description would read, "the west one-half and the east one-half of the south-west quarter of section four (4)." Both parties excepted to the report of the master before the chancellor. The chancellor sustained appellees' exceptions in part, modified the report of the master and entered a decree finding that the testator by his will devised to his widow for a term of thirteen years the north one-half of the west one-half of the south-west quarter and the north one-half of the east one-half of the south-west quarter of said section 4; that he did not own the other land described in the will, and that the south-east quarter of the north-west quarter and the south one-half of the east one-half of the south-west quarter were intestate estate and descended to the heirs of the testator, and a decree for partition of said two last mentioned tracts was entered and commissioners appointed to make partition thereof. Complainants below have prosecuted this appeal from that decree.

The first tract of land described in the second clause of the will is the south one-half of the west one-half of the north-east quarter of section 4. Thomas Clancy owned no land in that quarter of the section. He did own the south-east quarter of the north-west quarter. The second description is the west one-half and north one-half of the east one-half of the south-west quarter of said section 4. Thomas Clancy did not own the whole of the west one-half of the south-west quarter but he did own the north one-half of said west one-half of the south-west quarter. He owned the whole of the east one-half of said quarter

section. Appellants insist that the court erred in not construing the will to devise the whole farm, and the appellees contend the decree is erroneous in finding that more than sixty acres of it was devised by the will and have assigned cross-errors to that effect.

It has been held in numerous cases decided by this court that where a description of property intended to be devised in a will is true in part but not true in every particular, if by eliminating the false description enough remains to identify the subject of the devise so that effect will be given to the intention of the testator, this may be done without violating the rule against the reformation of wills. But this can only be done by striking out the false part of the description, and nothing can be substituted in place of what is stricken out. It is unnecessary in this case to discuss the decisions upon that question. They are cited and reviewed in the late case of *Graves v. Rose*, 246 Ill. 76. It is clear that to hold the south-east quarter of the north-west quarter was devised by the description in the will of the south one-half of the west one-half of the north-east quarter would be a reformation of the will. The second description in clause 2 includes land the testator did not own and omits land he did own. By no process of striking out words of false description will there be left remaining a sufficient description to identify and include the whole one hundred and twenty acres owned by testator in the south-west quarter of the section.

Appellees contend the second description in clause 2 refers only to the east one-half of the south-west quarter and devises the west one-half and the north one-half of the eighty. As these descriptions overlap they would include only sixty acres. We do not agree with this construction. The testator owned the north one-half of the west one-half of the south-west quarter. The devise was of the whole eighty and was operative to devise the half of it testator owned. The remaining description is the north one-half

of the east one-half of the south-west quarter, which is clear, definite and certain but includes no part of the south forty acres of the east one-half of the south-west quarter. To construe the will to devise more of the one hundred and sixty acres than eighty acres would require striking out parts of a true description and the substitution of other words of description. This the law does not allow, notwithstanding the presumption that the testator intended to dispose of all his property by his will. We think it clear the chancellor placed the proper construction upon the will.

Appellants contend if the decree was correct that eighty acres of the testator's land was intestate estate, the intestate property must first be resorted to for the payment of debts and costs of administration and that the decree should have so ordered. Paragraph 20 of the decree finds that the eighty acres held to be intestate property descended to the children of Thomas Clancy upon his death, "subject to any right the executor may have therein as may be required to settle said estate." Paragraph 21 finds that no other persons than said children have any title to or interest in the premises, "except such rights as the executor may be required to assert in settling said estate and the payment of any debts against the same or the costs and expenses of administration thereon, which should be determined by the county court in which the said estate is being administered." We do not think the court was required to, or could properly, go further in this case. The decree safeguards the interests of all parties and deprives none of them of any rights.

Appellants further contend that if any land is held to be intestate estate the legacies of \$800 to each of appellees should be made a charge upon that part of the land. The will specifically makes those legacies a charge against the land devised to the widow for thirteen years. At the expiration of that period the land so devised is to be sold by the executor and the legacies paid out of the proceeds. No

authority exists to direct said legacies to be paid out of the proceeds of the sale of other land.

We find no error in the decree of the circuit court, and it is affirmed.

Decree affirmed.

ARTHUR BEAUCHAMP, Appellee, vs. THE STURGES & BURN MANUFACTURING COMPANY, Appellant.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. MASTER AND SERVANT—*injured child has right of action for damages though the statute does not expressly so state.* Where a child under the age specified in the act of 1903, relating to the employment of children, is employed in violation of the statute and is injured, he has a right of action for damages against the employer even though the statute does not expressly so provide. (*Strafford v. Republic Iron Co.* 238 Ill. 371, adhered to.)

2. SAME—*child not estopped by false statement as to his age.* A child under the age specified by the act prohibiting the employment of children in certain occupations cannot, by making a false statement as to his age, render lawful his employment in violation of the statute, and he is not on that ground estopped from maintaining an action against his employer for damages in case he is injured. (*American Car Co. v. Armentraut*, 214 Ill. 509, followed.)

3. CONSTITUTIONAL LAW—*section 11 of the Child Labor law of 1903 is not invalid as fixing age limit of boys too high.* Section 11 of the act concerning the employment of children in hazardous occupations is not, in fixing the age limit of boys who may enter certain occupations at sixteen years, invalid upon the ground that a boy sixteen years old should be held to have arrived at the age of discretion and be allowed to choose his occupation and exercise his right of contract with reference thereto without restraint.

4. SAME—*the fact that liability for damages is not expressed in title does not render section 11 of Child Labor law invalid.* The right of an injured child, employed in violation of section 11 of the act of 1903, to maintain an action for damages against his employer arises under the statute by implication, and a construction which authorizes the maintenance of such action does not render section 11 of the act unconstitutional upon the ground that a new liability is created by such section which is not expressed in the title of the act.

APPEAL from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

BULKLEY, GRAY & MORE, for appellant.

GEORGE E. GORMAN, and WILLIAM BIGANE, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced by Arthur Beauchamp, by his next friend, in the superior court of Cook county, against the Sturges & Burn Manufacturing Company, to recover damages for a personal injury sustained by the plaintiff while in the employ of the defendant. The case was submitted to a jury upon a declaration consisting of one count, which averred that the plaintiff was under the age of sixteen years at the time of his employment; that he was employed by the defendant as a presshand in its factory, to operate a punch press, which employment was prohibited by section 11 of an act entitled "An act to regulate the employment of children in the State of Illinois, and to provide for the enforcement thereof," approved May 15, 1903, in force July 1, 1903; (Hurd's Stat. 1909, p. 1082;) that on the 26th day of April, 1907, and while plaintiff was operating said punch press, without fault on his part his right hand was caught in said punch press and was so crushed and mangled that it was necessary to amputate three of the fingers on said hand, and that the employment of the plaintiff, as aforesaid, in violation of the statute, was the proximate cause of his injury. The plea of the general issue and a plea setting up the unconstitutionality of the section of the statute upon which said action was based were filed, and upon a trial a verdict was returned in favor of the plaintiff for the sum of \$4500, upon which the court, after overruling a motion for a new trial and in arrest of judgment, ren-

dered judgment in favor of the plaintiff. The defendant has brought the case direct to this court by appeal, on the ground that the section of the statute upon which the action was based is unconstitutional.

At the close of all the evidence the defendant moved the court for a directed verdict on the grounds (1) that the violation of the statute by the defendant did not give the plaintiff a cause of action; (2) that the plaintiff was estopped from maintaining his action because he represented to the defendant, at the time he was employed, that he was more than sixteen years of age; (3) that the section of the statute upon which the plaintiff's cause of action was based is unconstitutional. The court overruled the motion and the action of the court in so doing has been assigned as error, and the three propositions contained in said motion have been elaborately argued by counsel in the briefs filed in this court and orally before the court.

The facts, in brief, are as follows: Plaintiff, at the time of his injury, lacked seven days of being sixteen years of age, and he had been in the employ of the defendant, when injured, about two weeks; that two employees of the defendant testified that at the time the plaintiff was employed by the defendant he represented to the agent of the defendant who employed him that he was past seventeen years of age, but this was denied by the plaintiff; that the plaintiff was set to work upon a punch press by the defendant in its factory; that the punch press, while plaintiff was at work therewith, repeated, and caught the right hand of the plaintiff and crushed and mangled it so that three fingers of that hand were necessarily amputated.

The first contention of the appellant is that the employment of the appellee in violation of the statute, and his injury, did not give to the appellee a cause of action against appellant, as the statute does not in express terms provide that a child who is employed in violation of the statute, and while so employed is injured, shall have a right of

action against his employer for the recovery of damages for such injury. We do not agree with this contention. The precise question here presented for decision was before this court in *Strafford v. Republic Iron Co.* 238 Ill. 371, and was in that case decided adversely to the contention of the appellant. That was an action to recover for a personal injury by a boy thirteen years, eleven months and eight days old, who was injured in feeding angle-irons into a straightening machine, in violation of the statute which prohibits the employment of a child in a hazardous business under the age of fourteen years. The court, in deciding that case, on page 378 of the opinion said: "The fact that the statute under consideration does not in express terms provide a liability in damages for its violation, as is done by certain statutes relating to mines and miners, can make no difference under the construction given the statute in *American Car Co. v. Armentraut*, 214 Ill. 509. The statute was enacted for the protection of the health and safety of children, and a liability for damages resulting from its violation is created whether it is expressly so declared in the statute or not." This decision accords with logic and reason and is supported by what we believe to be the weight of authority, and we do not feel justified in receding from the holding announced therein.

It is next contended that the appellee is estopped from maintaining this action because, it is said, he represented to the appellant, at the time he was employed, that he was over seventeen years of age. If the appellee did misrepresent his age at the time he was employed, we are of the opinion he was not estopped from maintaining this action by reason of such representation. The law is, that if the appellant employed the appellee in violation of the statute it is liable if he was injured while in such employment. The case of *American Car Co. v. Armentraut*, *supra*, was an action on the case to recover damages by a boy who had been employed in violation of the statute prohibiting

the employment of a child under fourteen years of age and who was injured while in such employment. Evidence was offered tending to show that at the time the boy was employed he stated he was sixteen years of age. The evidence so offered was excluded, and thereafter the defendant asked an instruction to the effect that if the boy falsely represented, at the time of his employment, that he was sixteen years of age and that he obtained his employment by reason of such false statement there could be no recovery. The instruction was refused, and it was held that the fact that the child falsely represented himself to be over fourteen years of age did not preclude him from maintaining an action to recover for an injury sustained while he was engaged in such employment or furnish a defense to his employer against such action, and that the evidence was properly excluded and the instruction was properly refused. That case is directly in point and controls this case, and it is not necessary to cite other cases to show that a child under the prohibited age cannot, by a false statement as to his age, make his employment in violation of the statute lawful and authorize the employer to do that which the statute in express terms says he shall not do. To so hold would be to hold a child by his false statement could, in effect, repeal the statute.

It is finally contended that section 11 of the statute is unconstitutional. It is conceded by the appellant that the legislature, under the police power, has the right to pass legislation which will prohibit the employment of children of tender years in hazardous occupations, but it is said that a boy sixteen years of age should be held to have arrived at the age of discretion, and that a statute which prohibits his employment in such occupations is an unlawful interference with his right of contract and is unconstitutional. The argument of the appellant is, therefore, that the statute is unconstitutional because it is unreasonable to prohibit a boy sixteen years of age from engaging in any class

of employment, but it is not contended it is unconstitutional by reason of the lack of power in the legislature to legislate upon the subject,—in other words, while the statute as applied to a boy fourteen years of age might be constitutional, as applied to a boy sixteen years of age it is unconstitutional. The question is therefore reduced to the proposition that the statute is an unreasonable exercise of the police power and not a usurpation of that power. While it might be conceded that in a very flagrant case (which question we do not decide) the courts could hold a statute unconstitutional on the ground that it was an unreasonable exercise of the police power, still, here it is only claimed that the age limit is fixed too high at which children may be lawfully employed in hazardous employments. Before the courts would assume to interfere and hold a statute unconstitutional, the age limit would necessarily have to be fixed so high as to show, clearly and beyond all question, that the age at which it was fixed was unlawful. We do not think the statute in question is unconstitutional as an unreasonable exercise of the police power.

In *Strafford v. Republic Iron Co. supra*, on page 375 it was said: "The statute in express and positive language forbade the employment of appellee in the business appellant was engaged in, in any capacity, and in the *Armentraut case* it was said such construction should be given the act as to effectuate its purpose, if it can be done without violence to the letter of the statute. The validity of such statutes has been sustained as an exercise of the police power of the State upon the ground that the State is interested in the protection of children, and to that end may pass laws preventing their employment at a tender age, when they should be in school, in occupations that expose them to danger of being crippled and maimed for life, and thereby rendered less capable of taking care of themselves and discharging the duties of citizenship on arriving at maturity. The wisdom and humanity of the statute cannot

be questioned, and in the *Armentraut case* we held that an employer must know, at his peril, that children employed by him are of an age that he may lawfully employ them."

In *Starnes v. Albion Manf. Co.* 146 N. C. 556, the Supreme Court of North Carolina said in a case where a similar question was at issue: "Child labor laws have been adopted in nearly all the States of this Union and Canada and are in force in nearly all the governments of Europe and of the Australian continent. They are founded upon the principle that the supreme right of the State to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights. In this country their constitutionality, so far as we can ascertain, has never been successfully assailed. The supervision and control of minors is a subject which has always been regarded as within the province of the legislative authority. How far it shall be exercised is a question of expediency, which it is the province of the legislature to determine."

In *City of New York v. Chelsea Jute Mills*, 88 N. Y. Supp. 1085, in a case growing out of the violation of the statute prohibiting the employment of children under fourteen years of age, the court said: "This statute is assailed for unconstitutionality. No particular provision of the State or Federal constitution is assigned. It is claimed to be 'an unwarranted, illegal and unconstitutional deprivation of the liberties of the defendant.' * * * The integrity of the statute is upheld under the police power of the State. A statute should not be declared unconstitutional unless required by the most cogent reasons or compelled by unanswerable grounds. Every presumption is in favor of the constitutionality of a statute. It is difficult to satisfactorily define the police power to cover every case, but it includes such legislative measures as promote the health, safety or morals of the community. It is true that the legislature must respect freedom of contract and the right to live and

work where and how one will, yet the weal of the people is the supreme law. The legislature may not disregard it. Private interests are subordinated to the public good, and even a statute opposed to natural justice and equity, requiring vigilance or causing vexation or annoyance, will be upheld if within constitutional limitations. Much more potent, if possible, is a statute seeking the protection of children. They are the wards of the State, which is particularly interested in their well being as future members of the body politic, and has an inherent right to protect itself and them against the baneful effects of ignorance, infirmity or danger to life and limb."

In *Inland Steel Co. v. Yedinak*, 87 N. E. Rep. 229, a similar statute was before the Supreme Court of Indiana. In answering the charge that the appellant was denied the equal protection of the laws and was deprived of property without due process of law, that court said: "Children under sixteen years of age are wards of the State and are pre-eminently fit subjects for the protecting care of its police power. This power is an inherent attribute of sovereignty, and may be exercised to conserve and promote the safety, health, morals and general welfare of the public. The liberty and property of the individual citizens are held subject to such reasonable conditions as the State may deem necessary to impose in the exercise of this power. Such regulations and conditions will not fall within the inhibitions of the fourteenth amendment unless they are palpably arbitrary, extravagant and unreasonably hurtful and unnecessarily and unjustly interfere with private rights."

It is also urged that section 11 of the act is unconstitutional because the subject matter in that section is not expressed in the title of the act. In *Maule Coal Co. v. Parthenheimer*, 155 Ind. 100, it was said: "To express the subject of a statute in the title, in compliance with the requirement of the constitution, no particular form or terms are exacted, nor is it essential that such subjects be ex-

pressed with precision. The title will sufficiently conform to the command of the constitution if it be so framed and worded as fairly to apprise the legislators, and the public in general, of the subject matter of the legislation, so as to reasonably lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the act and its title must correspond—not literally, but substantially; and such correspondence is to be determined in view of the subject matter to which the legislation relates.” The last clause of the title is, we think, broad enough to cover any reasonable regulation which would tend to insure the enforcement of the main object of the act, which was to protect children from engaging in employments where their immaturity, inexperience and heedlessness might cause them to be injured, which object, we think, would be materially advanced by a provision imposing a personal liability upon an employer to a child, who should employ a child in violation of the statute. The constitutional provision that “no act hereafter passed shall embrace more than one subject and that shall be expressed in the title,” must have a reasonable construction and be liberally construed in favor of the validity of the enactment, (*Blake v. People*, 109 Ill. 504,) and any means which are reasonably adapted to secure the object indicated in the title may be included in the body of the act. (*Larned v. Tiernan*, 110 Ill. 173.) The right to maintain a civil action against the employer arises under the statute by implication, and a construction which authorizes the maintenance of such action does not render section 11 of the act unconstitutional by reason of the fact that a new liability has been created by that section of the statute which is beyond the scope of the title of said act.

Finding no reversible error in this record the judgment of the superior court will be affirmed.

Judgment affirmed.

THE STATE BANK OF CLINTON, Appellee, *vs.* SYLVIA BARNETT, Appellant.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. APPEALS AND ERRORS—*when chancery case may be regarded as presented for a hearing de novo.* Where all the material evidence in a chancery case is taken before the master and reported without any conclusions of fact the chancellor has no better means of judging the candor, fairness and credibility of the witness than the Supreme Court, and on appeal the case may be regarded substantially as presented for hearing *de novo* on the same evidence.

2. WITNESSES—*a wife not competent to testify to conversations with husband during coverture.* A wife is not competent to testify to conversations with her husband during coverture in order to establish that though she was named as his beneficiary in a benefit certificate, she was, in fact, the nominal beneficiary and her daughter was the real beneficiary in interest.

3. TRUSTS—*when burden of establishing trust is upon the defendant.* In a proceeding to subject a fund represented by the proceeds of a benefit certificate to payment of a judgment against the named beneficiary, who received the proceeds and immediately turned the money over to her daughter, who invested the same, if the daughter claims that the money was turned over to her for no reason other than that it belonged to her as the real beneficiary and that her mother was a mere trustee, the burden is upon her to establish her contention by competent proof.

4. FRAUD—*what is necessary to render a gift presumptively fraudulent.* To render a gift presumptively fraudulent as to the donor's creditors it must be shown that there was a voluntary gift, that there was a then existing or contemplated indebtedness against the donor, and that the donor did not retain sufficient property to pay the indebtedness.

5. SAME—*when it is necessary to aver and prove insolvency of donor at time gift was made.* Where the complainant in a chancery proceeding seeks to reach the proceeds of a voluntary gift upon the ground that it was fraudulent, in law, as to the donor's creditors, there being no actual fraud, it is essential that the complainant aver and prove that the donor was insolvent at the time the gift was made.

6. SAME—*what does not show that donor was insolvent when gift was made.* Averment and proof that the complainant recovered a judgment against the donor of a voluntary gift, on a note existing when the gift was made, and that execution has been is-

sued and returned *nulla bona*, establishes *prima facie* the insolvency of the donor at the time the execution was returned but does not show that she was insolvent at the time the gift was made, which was more than two years before recovery of the judgment on which the execution issued.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

EDWARD J. SWEENEY, and DEMANGE, GILLESPIE & DEMANGE, for appellant.

LEMON & LEMON, and HERRICK & HERRICK, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellee, the State Bank of Clinton, on September 30, 1907, filed its creditor's bill in the circuit court of DeWitt county against Sylvia Barnett, the appellant here, Lucy J. Barnett, and others, alleging that on December 30, 1902, Lucy J. Barnett and W. A. Barnett, her husband, (now deceased,) executed and delivered to the appellee their two promissory notes for the sums of \$1000 and \$1394.89, respectively, to each of which notes was attached a power of attorney authorizing the confession of judgment thereon; that at the time of his death W. A. Barnett held a benefit certificate in the Modern Woodmen of America for the sum of \$3000, payable to his wife; that his wife collected the amount of the benefit certificate and made a pretended gift of the same, without consideration, to her daughter, Sylvia Barnett, the appellant; that upon receiving the money Sylvia loaned the same to one B. C. Sprague, taking his promissory notes therefor; that she thereafter recovered judgments against Sprague aggregating \$3125, upon which executions were issued, which were levied upon lands of Sprague; that on July 29, 1907, judgment by confession

was entered upon the said notes given to appellee, in the circuit court of DeWitt county, against Lucy J. Barnett for the sum of \$3236.93; that execution was issued thereon and returned *nulla bona*; that appellant, aside from the judgments against Sprague, was insolvent, and if permitted to collect said judgments she would appropriate the money to her own use and appellee would be left without remedy, and that the money represented by said judgments was the property of Lucy J. Barnett and not that of the appellant. Upon the filing of the bill a temporary injunction was issued restraining the sheriff, who was made a defendant, from delivering to Sylvia Barnett a certificate of sale without receiving the money therefor, and commanding him to retain the proceeds of sale subject to the further order of the court. Lucy J. Barnett and appellant filed separate answers, by which they each admitted that upon the death of W. A. Barnett the proceeds of his benefit certificate were paid to Mrs. Barnett and by her transferred to appellant, who loaned the same to Sprague. The answers each deny that Mrs. Barnett had any interest in the proceeds of the benefit certificate, or in the notes given by Sprague to appellant, or in the judgments obtained against Sprague, and aver that although Mrs. Barnett was named in the benefit certificate as beneficiary the insurance was procured by W. A. Barnett for the sole benefit of appellant, and that the proceeds of the benefit certificate were the property of appellant and not that of Mrs. Barnett. The cause was referred to a special master in chancery to take the evidence and report the same, without his conclusions, to the court. Upon the hearing the court found the issues for appellee, and a decree was entered finding the facts substantially as alleged in the bill, ordering that the sheriff of DeWitt county be perpetually enjoined from paying the money which had been secured on the execution against Sprague, to appellant, and directing him to pay to appellee the money in his hands, to be applied on the judgment in its favor

against Lucy J. Barnett. Upon an appeal to the Appellate Court for the Third District this decree was affirmed. The cause is now brought to this court by appeal, upon a certificate of importance.

All the evidence in the case, with the exception of a small portion which is not material to this decision, was taken before the master and reported by him without any conclusions as to the facts. The chancellor had therefore no better means of judging the relative candor, fairness and credibility of the respective witnesses than we have, so the appeal may be regarded substantially as presenting the case to us for a hearing *de novo* upon the same evidence. *Baker v. Rockabrand*, 118 Ill. 365; *McGinnis v. Jacobs*, 147 id. 24.

Barnett died October 14, 1904. The proceeds of the benefit certificate were paid to Mrs. Barnett December 23, 1904, and the amount was immediately turned over to appellant. The notes given appellee, and upon which judgment was secured by confession against Mrs. Barnett on July 29, 1907, were dated December 30, 1902, and were due on demand and six months after date, respectively, with powers of attorney attached authorizing confession of judgment at any time. The fund in question was loaned to Sprague by appellant February 11, 1905.

The contention of appellant in the trial court, and one of her contentions here, is, that her mother, Mrs. Barnett, by parol agreement with her father, had been constituted a trustee to receive the proceeds of the benefit certificate and pay the same, upon his death, to appellant. To support her contention and to establish the existence of such parol trust, witnesses, including Mrs. Barnett, were called, who testified to statements made by W. A. Barnett, in his lifetime, that appellant was the real beneficiary in his benefit certificate, that arrangement had been made whereby his wife was to receive the money, in case of his death, for appellant, and as to his reasons for having made his wife

the nominal beneficiary instead of having the money paid directly to his daughter. All of this testimony was objected to on the ground that it was hearsay. Mrs. Barnett was not a competent witness to testify to any conversations with her husband during coverture. All of the testimony in regard to statements made by W. A. Barnett in reference to his purpose in carrying a benefit certificate in the Modern Woodmen and in reference to who his real beneficiary was is clearly incompetent. It does not come within any of the well known exceptions to the rule against hearsay evidence. Had appellant been able to establish by competent evidence the situation disclosed by the pretended statements of W. A. Barnett, she would have established the existence of a parol trust, as claimed. Mrs. Barnett was the beneficiary named in the benefit certificate, and the proceeds of that certificate were paid to her by the society of Modern Woodmen and were turned over by her to appellant. It is not claimed by the appellant that this fund was turned over to her for any other reason than that it belonged to her and did not belong to her mother. The burden was upon appellant to prove this contention, and there is no competent evidence in the record to sustain it.

Unless there was actual fraud in the transaction the transfer of this fund from Mrs. Barnett must be held to be a voluntary gift. Appellee insists that this transaction was fraudulent in fact. In support of this contention it produced two witnesses, B. C. Sprague and an attorney who had represented Sprague and who had also represented appellee. Sprague testified that on February 11, 1905, when he executed the notes to appellant, Mrs. Barnett and appellant both treated this money as the property of Mrs. Barnett, and that Mrs. Barnett on that occasion told him she was indebted to the appellee bank and desired to loan the money in the name of her daughter, as she did not want appellee to know where the money was. This testimony is contradicted by appellant, Mrs. Barnett and F. Y. Hamil-

ton, an attorney of Bloomington, who was present assisting appellant in making the loan. Sprague's testimony is so contradictory and inconsistent that it is unworthy of consideration. His story is also improbable for the reason that he was then, and had been for years, a stockholder and a director of the appellee bank, which fact was a matter of public knowledge. The attorney who testified stated that Mrs. Barnett, Hamilton and Sprague called at his office and discussed the matter of the loan to Sprague and the giving of the notes, and detailed statements by Mrs. Barnett similar to those testified to by Sprague. Both Hamilton and Mrs. Barnett deny that they were in his office on the day the notes were given or that they ever had such a conversation with him, and Sprague did not testify at all to that incident. Hamilton and Mrs. Barnett both testified that they, in company with Sprague, were in this attorney's office on December 12, 1904, before the insurance money had been paid to Mrs. Barnett, and that on that occasion they discussed only a contract which had been made between Barnett, in his lifetime, and Sprague, who had been associated in business with him, and which this attorney had drawn, and that that was the only time they were ever in his office. The testimony of these two witnesses is clearly overcome by the evidence on the part of appellant. The whole evidence discloses that so far as the actions of appellant and Mrs. Barnett are concerned since the payment of this fund to Mrs. Barnett by the society of Modern Woodmen, it was treated by them as the property of appellant and not the property of Mrs. Barnett. The record does not disclose any fraud, in fact, in reference to the transfer of this fund from Mrs. Barnett to her daughter, and if there is any fraud, it is only such fraud as is presumed by reason of the making of a voluntary gift. In order to constitute presumptive fraud, or fraud in law, in such a case, three elements must be proven: First, there must be a voluntary gift; second, there must be a then

existing or contemplated indebtedness against the donor; and third, it must appear that the donor did not retain sufficient property to pay her indebtedness.

It is contended by appellant that the bill does not aver and the proof does not show the insolvency of Mrs. Barnett. The bill does aver, and the proof establishes, that appellee secured judgment against Mrs. Barnett, upon which execution was issued and returned *nulla bona*. This establishes *prima facie* the insolvency of Mrs. Barnett at the time of the return of the execution. There is no averment in the bill of the insolvency of Mrs. Barnett at the time of the gift to appellant and there is no proof of that fact in the record. Appellee attempted to make such proof by calling appellant as a witness, but the substance of appellant's testimony on this subject is, that she did not know what property her mother possessed or what her financial responsibility was at that time. Appellee having failed to prove fraud in fact, the burden of proof devolved upon it to show that Mrs. Barnett rendered herself insolvent by making this gift before it could establish presumptive or legal fraud. In passing upon this question in *Moritz v. Hoffman*, 35 Ill. 553, we said (p. 556): "No one will dispute the principle appellant seeks to establish, that a voluntary conveyance, when the grantor is indebted at the time of its execution, is presumptive evidence of fraud; and a fraudulent intent will be presumed from the fact that the party conveying was indebted at the time the conveyance was executed, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law is void. The principle is thus broadly stated, but it is subject to some qualification,—to this extent, at least, that the debtor retains in his possession property sufficient to discharge all debts existing at the time of making the conveyance alleged to be fraudulent. If this was not permitted, trade of every description would be very much crippled, and instead of there being an active interchange of property the

whole business of the country would stagnate. No creditor without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such grantor must make himself insolvent by such gifts or conveyances, and to impeach them, fraud must be charged and proved." And in the same case we also said (p. 558): "To impeach such a conveyance successfully it lies upon the complainant to aver and prove that he was a creditor at the time and that the grantor was then insolvent, or such facts and circumstances as would authorize a court or jury to presume insolvency, none of which have been established in this case." This case was followed and approved in *Merrell v. Johnson*, 96 Ill. 224, *Bittinger v. Kasten*, 111 id. 260, and *Falloon v. McIntyre*, 118 id. 292. In the *Bittinger* case it was said: "The owner of property may at any time give the same to anyone he chooses, so long as he thereby injures no then existing creditor, * * * and the mere fact that he may be indebted is not alone sufficient to make a gift or voluntary conveyance by him inoperative;" and it was held that if the creditor failed to aver and prove insolvency of the debtor at the time the conveyance was made he was entitled to no relief. In passing upon the same question in *Dimond v. Rogers*, 203 Ill. 464, we said (p. 468): "In order to obtain relief it was necessary to prove a transfer which, in fact or in law, was fraudulent as to creditors, or in case of a voluntary gift or conveyance to the husband, that the judgment debtor did not retain enough money or property to pay her debts."

It will thus be seen that it was necessary to both aver and prove the insolvency of Mrs. Barnett at the time the gift was made, in 1904. It might well be that in December, 1904, when the gift was made to her daughter, she retained abundant means to pay all of her indebtedness, and that she had become insolvent when the judgment was

secured against her, in July, 1907. If such were the fact, it would be inequitable to compel appellant to now pay over to appellee money which her mother had a perfect right to give her at the time the gift was made.

The decree of the circuit court and the judgment of the Appellate Court are reversed and the cause remanded to the circuit court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

THE CHICAGO AND ALTON RAILROAD COMPANY, Appellee, vs. THE PEORIA AND PEKIN UNION RAILWAY COMPANY, Appellant.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. RAILROADS—when terminal contract is, in effect, a lease—liability of terminal company for goods stolen. Where a railroad company having no terminal facilities of its own in a certain city contracts with a terminal railroad company for the use of its terminal facilities and tracks conjointly with other railroad companies having similar contracts and employs the terminal company to do all necessary switching, the contract is, in effect, a lease.

2. Under such contract, whenever any part of the terminal company's tracks is occupied by the lessee's cars placed there, under the contract, for delivery to the consignee, the occupancy is the occupancy of the lessee.

3. In switching and transferring cars under such contract the terminal company assumes the liability of a common carrier, but when the cars are placed where directed by the lessee the terminal company's liability ceases, and the duty of delivery to the consignee, as well as the care of the car and its contents until delivery, rests upon the lessee and not upon the terminal company, and the latter is not liable if goods are stolen from the car.

CARTER, J., dissenting.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

STEVENS, MILLER & ELLIOTT, for appellant.

PAGE, WEAD, HUNTER & SCULLY, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Appellate Court for the Second District affirmed a judgment of the circuit court of Peoria county in favor of the appellee, against the appellant, and granted a certificate of importance and appeal to this court.

Appellee's claim was for reimbursement of the amount paid by it to several claimants for the loss of goods from freight cars transferred by the appellant. The appellant is a railroad corporation owning and operating a railroad from Peoria to Pekin. It owns extensive terminal facilities in Peoria, consisting of main tracks, side-tracks, switches, turn-outs, connecting tracks, round-houses, freight houses, passenger depots and storage and unloading tracks, together with cars and locomotives necessary in carrying on its business. It does an extensive business in transferring for other railroad companies whose railroads enter the city of Peoria, loaded and empty freight cars between the terminal points of such railroads in the city and between such terminal points and the points of destination of such cars on the tracks of appellant in the city. The appellee is a railroad corporation running its trains into the city of Peoria but not owning or operating any terminal facilities there. By virtue of a contract with the appellant it is entitled to the use of all the terminal facilities of the appellant in Peoria, and is obliged to deliver all its freight cars coming into or going out of or through Peoria to the appellant to be transferred, and the appellant is bound to transfer all loaded or empty cars between all freight houses, warehouses and the various other points of delivery on its tracks and the tracks and warehouses of other railroads with any of which any of the appellant's tracks shall be connected and the tracks and divisions of appellee's rail-

road. The appellee was granted the right to use the tracks and terminal facilities, but not exclusively, the appellant reserving the right to make or renew similar contracts with other railroad companies and to use such tracks and terminal facilities for the operation of its own trains. The appellee agreed to pay as rental for the said tracks and terminal facilities \$22,500 per annum; to pay its just proportion, according to a rule established by the contract, of the maintenance, renewal and repair of certain of the tracks and premises; to pay such reasonable sum for each of its passenger, mail and baggage cars entering or leaving the appellant's union passenger depot at Peoria as should be fixed by the appellant, being a uniform rate for each car to be charged all companies running their passenger trains to and from the said depot, without discrimination; to pay all such reasonable charges as should be made by the appellant for the transfer service to and from connecting railroads, being a uniform rate for each car, previously fixed by the appellant, to be charged to all companies for such service, without discrimination; and to pay all such reasonable charges as should be made by the appellant for handling and switching its loaded and empty cars to and from freight houses, warehouses, packing houses, stock yards, grain elevators, distilleries, mills and other industries at the cities of Pekin and Peoria, being a uniform rate for each car, which should have been previously fixed by the appellant, to be charged to all companies for such service, without discrimination. The contract provided for the full and equal use and enjoyment, without discrimination, by the appellee, and by all other companies having the right to such use and enjoyment, of all the said tracks, switches, depots, freight houses and other property, of the service of handling, switching and transferring cars, of equal facilities and accommodations for their business and of equal care and attention to it on the part of the appellant, and that the general management, control and supervision of

all the property, and of the use, location, improvement and repair of it, should be in the full and sole control of the appellant. The written contract is long, but it is believed that what has been set out discloses sufficient of its terms for the proper disposition of the case. It was under this contract that the goods, the loss of which constitutes the appellee's claims, first came to the possession of the appellant. The goods were shipped over different railroads from different places, at different times, to different consignees, and were all brought by the appellee in its trains to Peoria to the yards of the appellant. The appellee in each instance directed the appellant to transfer the car to the appellant's Water street track, to be unloaded by the consignee. The cars were transferred by the appellant and left on the track where the appellee directed them to be placed. Before they were unloaded the cars were broken into and a part of the goods were stolen.

The chief controversy is as to the existence of a duty on the part of the appellant to exercise care to prevent the loss of the contents of the cars after they had been placed upon the track where directed by the appellee. The parties agree that in transferring the cars the appellant acted as a common carrier. Their disagreement is as to when the appellant's service ended. The appellant claims that it had performed its whole duty when it set the cars for unloading as directed by the appellee and that its liability for the cars or their contents then ceased. The appellee insists that after the cars were placed for unloading the appellant was still bound to exercise care to prevent the loss of them, and that its liability was that of a warehouseman. On the trial propositions of law were submitted by either side as to the appellant's duty and liability. Those stating the appellee's view were held by the court and those stating the appellant's view were refused.

By the cases of *Peoria and Pekin Union Railway Co. v. United States Rolling Stock Co.* 136 Ill. 643, and *East*

St. Louis Connecting Railway Co. v. Wabash, St. Louis and Pacific Railway Co. 123 id. 594, it is determined that appellant was not liable as a common carrier after placing the cars. The trial court and the Appellate Court, however, held it liable as a warehouseman or bailee for hire, and in so doing fell into error. In the contract between the parties the appellee is referred to as a lessee. In fact, it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete, though not so extensive, as that of the appellant, who owns them. The right is not exclusive, but is shared with the appellant and the other railroad companies to whom similar leases have been made. Whenever any part of the appellant's track is occupied by the appellee's cars, placed there, under the contract, for delivery to the consignee, the occupancy is the appellee's occupancy. It is for the time being exclusive, and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee orders a car placed on one of the appellant's tracks which the appellee has the right to use, and the car is accordingly so placed, the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of the appellee's own track, except that the appellee cannot use its own motive power to change the location of the car but must call upon the appellant for that purpose. In switching and transferring cars in accordance with the appellee's directions, whether from the appellee's terminal at Peoria to the track of appellant convenient for delivery to the consignee, or from one of the tracks or divisions of the appellee's railroad to another of such tracks or divisions, or to another railroad, or from one of the appellant's tracks to another, the appellant's duty and liability are the same. In all this switching service, of whatever character, it acts merely as the agent of the appellee to shift the latter's cars from one track which the appellee

has a right to use to another track which it has a right to use, for the purpose of enabling the appellee conveniently to complete its contract of carriage and make delivery to the consignee. There is nothing to indicate that the appellant, when switching cars, knows anything about the car or its contents or consignee, or has any right to demand any such information. So far as appears it merely receives notice to move a certain car from one track to another, and has nothing to do with or knowledge of the consignee, the unloading, the delivery or the notice to the consignee. It has no further duty to perform in connection with that car until again requested to move it.

The contract of the appellant with the appellee was not to deliver to the consignee. That was the duty of the appellee. Since it had no facilities for delivering freight at its own terminal it obtained from the appellant a lease of other premises for that purpose, and since it could reach such premises only over the appellant's track, it employed the appellant to switch its cars to such premises. These premises, in the present case, were the appellant's Water street track, which was leased to the appellee in common with others, the lessor also reserving a certain use to itself. The service performed by the appellant was the hauling of cars from one of defendant's tracks to another, and when that service was performed the appellant's liability ended. When the cars were placed on the Water street track they were no longer in the possession of the appellant but were in the possession of the appellee, and the duty of delivery to the consignee, and the care of the car and its contents until such delivery, rested not upon the appellant but upon the appellee.

The judgments of the Appellate Court and circuit court will be reversed and the cause will be remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE CARTER, dissenting.

In *Ill. Cent. Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co.*, 123 Ill. 514, it is determined that appellant was not liable as a common carrier after placing the car. The trial court and the Appellate Court, however, held it liable as a warehouseman or bailee for hire, and in so doing fell into error. In the contract between the parties the appellee is referred to as a lessee. In fact, it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete though not so extensive, as that of the appellee who owns them. The right is not exclusive, but is shared with the appellant and the other railroad companies with whom similar leases have been made. Whenever any of the appellant's track is occupied by the appellee, and a car placed there, under the contract, for delivery to a consignee, the occupancy is the appellee's occupancy, the time being exclusive, and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee orders a car placed on any of the appellant's tracks which the appellee has the right to use, the car is accordingly so placed, the appellant's possession and control of the car are as complete as if the appellant were the owner. Obligations in respect thereto are the same as if the car stood upon any part of the appellee's track. The appellee cannot use its own motive power in the location of the car but must call upon the appellant for that purpose. In switching and transferring the car with the appellee's directions, whether at the terminal at Peoria to the track of the appellant for delivery to the consignee, or from the track of the appellant to the divisions of the appellee, or from the divisions of the appellee to the appellant's tracks, the obligations are the same as if the car were ever chartered by the appellee.

has a right to use to another train for the purpose of enabling it to complete its contract of transportation to the consignee. There is no right to switch cars when switching cars in its contents or consignee, and such information. Since the consignee has notice to move a car to another, and has nothing to do with the consignee, the unloading of the consignee. It has no right to use that car until after it has been delivered to the consignee.

The contract of the consignee to deliver to the consignee. Since it is the consignee's own terminal, it is not on other premises. The consignee on such premises is not the appellant. The premises, in the street track, with others. The service of cars from that service. When the cars were in the

in the premises to the consignee until the cars are delivered to the consignee.

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for the Second District in the Circuit Court of the United States, Judge, presiding.

1881.

Agency decree, based upon the sale, cannot be levied upon the premises have been liable on the mortgage. 58 Ill. 124; *Ogle v. Koerber*, 186 id. 510; *Bradley v. McCullough*, 4 Ill. 148 Fed. Rep. 346.

cannot redeem from his own or decree evidencing a balance which he caused to be made the established in Illinois but in nearly *Bank*, 125 Ind. 381; *Clayton v. Widen v. Smith*, 58 id. 285; *Todd v. Surgeon v. Adamson*, 62 id. 664; *Walker's Ch.* 330; *Lauriat v. Stratton v. Dennis*, 53 Cal. 77.

quires no right to proceed against the consignee unless he has a judgment or decree entered against him by execution, levy and sale. 58; *Borders v. Murphy*, 78 id. 152; *Mulvey v. Carpenter*, 106 id. 414; *McIlwain v. Mickelberry*, 244 id. 77.

of void process relieves the certificate of purchase, and

FLORA STRAUSE, Appellee, *vs.* MAE E. DUTCH *et al.*
Appellants.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. MORTGAGES—*foreclosure sale extinguishes lien of mortgages on which the suit is predicated.* A sale under a foreclosure decree extinguishes the lien of the mortgages upon which the suit is predicated, but the debt is not extinguished as to such portion as remains unsatisfied from the proceeds of the sale.

2. SAME—*mortgagee may obtain deficiency decree or sue at law for balance due.* If mortgaged property does not sell at the foreclosure sale for enough to satisfy the mortgage debt, the creditor, if personal service has been had upon the debtor, may obtain a deficiency decree upon which execution may issue or he may sue at law and recover a judgment for the balance due.

3. SAME—*mortgagee having deficiency decree is on same footing with other decree or judgment creditors.* A mortgagee who obtains a deficiency decree upon which an execution is ordered to issue stands upon the same footing as any other decree or judgment creditor and may employ the same means to enforce the decree, not by virtue of any lien of the mortgage but because of the personal liability of the mortgagor to pay the full mortgage debt.

4. SAME—*object of redemption is to prevent sacrifice of debtor's property.* The object of the statute in allowing a decree or judgment creditor to redeem from a foreclosure sale is to prevent a sacrifice of the debtor's estate and to allow as many of the judgment creditors as can, to secure payment of their judgments by making an advance which the debtor cannot or will not make.

5. SAME—*failure of mortgagor to redeem within twelve months does not deprive him of all interest.* Failure of a mortgagor to redeem within twelve months from the sale does not deprive him of all interest in the premises as he still has an equity of redemption, which is not extinguished until the full period for redemption is passed and a deed is issued to the purchaser.

6. SAME—*mortgagee having deficiency decree authorizing execution may redeem.* A mortgagee having a deficiency decree upon which execution is authorized to issue has a right to redeem as a decree creditor after twelve and within fifteen months from the foreclosure sale, though the mortgagor has not redeemed.

7. SAME—*equity of redemption does not exist by virtue of the mortgage.* A mortgagor's equity of redemption does not exist by virtue of the mortgage but is purely statutory, and if he does not

redeem within the twelve months allowed him by the statute no reason exists why such equity may not be subjected to sale under the statute by "any decree or judgment creditor" who will reimburse the purchaser at the sale, as prescribed by the statute.

FARMER, CARTWRIGHT and VICKERS, JJ., dissenting.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. N. GREEN, Judge, presiding.

CHARLES C. DUTCH, for appellants:

An execution issued upon a deficiency decree, based upon a balance due after a foreclosure sale, cannot be levied upon the premises foreclosed unless the premises have been redeemed by some person primarily liable on the mortgage debt. *Seligman v. Laubheimer*, 58 Ill. 124; *Ogle v. Koerner*, 140 id. 170; *Lightcap v. Bradley*, 186 id. 510; *Bradley v. Lightcap*, 201 id. 511; *McCullough v. Rose*, 4 Ill. App. 149; *Barry v. Harnesberger*, 148 Fed. Rep. 346.

The rule that "a person cannot redeem from his own sale by virtue of a judgment or decree evidencing a balance due, for the satisfaction of which he caused to be made the prior sale," is not only established in Illinois but in nearly all other States. *Horn v. Bank*, 125 Ind. 381; *Clayton v. Ellis*, 50 Iowa, 590; *Hayden v. Smith*, 58 id. 285; *Todd v. Davy*, 60 id. 532; *Spurgeon v. Adamson*, 62 id. 664; *Johnson v. Johnson*, Walker's Ch. 330; *Lauriat v. Stratton*, 6 Sawyer, 339; *Hershey v. Dennis*, 53 Cal. 77.

A redemptioner acquires no right to proceed against the premises redeemed unless he has a judgment or decree enforceable against the premises by execution, levy and sale. *Johnson v. Baker*, 38 Ill. 98; *Borders v. Murphy*, 78 id. 81; *Clingman v. Hopkie*, 78 id. 152; *Mulvey v. Carpenter*, 78 id. 580; *Meyer v. Mintonye*, 106 id. 414; *McIlwain v. Karstens*, 152 id. 135; *Bank v. Mickelberry*, 244 id. 77.

A redemption by virtue of void process relieves the premises from the lien of the certificate of purchase, and

the title to the premises is vested in the mortgagor discharged of that lien and the effect of the sale. The purchaser at such a redemption sale acquires no possessory rights or title, for the doctrine of *caveat emptor* applies to redemption sales the same as it applies to other sales. *Johnson v. Baker*, 38 Ill. 98; *Meyer v. Mintonye*, 106 id. 414; *McIlwain v. Karstens*, 152 id. 135; *Schroeder v. Bozarth*, 224 id. 310; *Lightcap v. Bradley*, 186 id. 510.

In an action of forcible entry and detainer, the defendants, under the plea of not guilty, can attack the validity of the process by virtue of which the plaintiff has received a sheriff's deed. In such case the burden is upon the plaintiff to prove a valid judgment, execution, levy and sale. *Johnson v. Baker*, 38 Ill. 98; *McIlwain v. Karstens*, 152 id. 135; *Fitzgerald v. Quinn*, 165 id. 354; *Kepley v. Luke*, 106 id. 395; *Kratz v. Buck*, 111 id. 40; *Peters v. Balke*, 170 id. 304.

JACK, IRWIN, JACK & MILES, and RADLEY & RADLEY, for appellee:

There is no rule of law in this State by which one is not allowed to redeem from his own sale. The Supreme Court of this State has held such redemptions to be valid. *Tewalt v. Irwin*, 164 Ill. 592; *Ogle v. Koerner*, 140 id. 170.

Where premises have been redeemed by the mortgagor or judgment debtor from a foreclosure or execution sale, they can again be sold for the satisfaction of an unpaid balance on the mortgage or judgment under which they were originally sold. *Ogle v. Koerner*, 140 Ill. 170; *Lightcap v. Bradley*, 186 id. 510; *Barry v. Harnesberger*, 148 Fed. Rep. 346.

A judgment creditor made a party to a foreclosure suit has the right to redeem after twelve months and within fifteen months from the foreclosure sale. *People v. Bowman*, 181 Ill. 421; *Wehrheim v. Smith*, 126 id. 346.

The Supreme Court has always consistently held that the redemption statute should be given a liberal construction. *People v. Bowman*, 181 Ill. 421; *Boynton v. Pierce*, 151 id. 198; *Blair v. Chamblin*, 39 id. 521; *Insurance Co. v. Beckman*, 210 id. 394; *Massey v. Westcott*, 40 id. 161; *Oldfield v. Eulert*, 148 id. 614.

If the purchaser accepts the redemption money the redemption will be held valid. *Smith v. Jackson*, 153 Ill. 399; *Pearson v. Pearson*, 131 id. 464; *Meyer v. Mintonye*, 106 id. 414; *Blair v. Chamblin*, 39 id. 521; *Massey v. Westcott*, 40 id. 161.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellee, Flora Strause, brought suit in forcible entry and detainer in the circuit court of Peoria county to recover possession of certain premises from the appellants, Mae E. Dutch and Charles C. Dutch. On a hearing before the court on stipulation of the facts judgment was rendered for appellee. This judgment was affirmed by the Appellate Court for the Second District. Having secured a certificate of importance, appellants have appealed from that judgment.

Appellants executed three trust deeds to the premises in question. The first and third in point of priority were given to secure notes held by the Interstate Bank and Trust Company for \$5000 and \$2500, respectively, and the second was to secure a note held by Arthur Keithley for \$3000. The Interstate Bank and Trust Company brought suit to foreclose its first and third trust deeds, to which suit Keithley was made a party. Decree of foreclosure was entered at the May term, 1907. By this decree the amount due on each of the three trust deeds was found, a sale of the premises ordered, and the proceeds of the sale were directed to be applied, first, to the payment of the note secured by the first trust deed; second, to the payment of the note secured

by the second trust deed held by Keithley; and third, to the payment of the note secured by the third trust deed. The decree also provided that if the amount realized should not be sufficient to pay the full amount of the indebtedness due the Interstate Bank and Trust Company it should be entitled to a deficiency decree for the balance. The premises were sold under this decree for an amount sufficient to pay in full the note secured by the first trust deed and the costs of the suit and \$400, which was applied on the Keithley indebtedness. The property was purchased by Edgar A. Strause, the husband of appellee. The sale was confirmed on September 11, 1907, and the Interstate Bank and Trust Company thereafter secured a deficiency decree against appellants for the sum of \$2686.90, which decree provided "that plaintiff have execution therefor as upon a judgment at common law." No deficiency decree was entered in favor of Keithley. Neither the appellants nor any other persons authorized to do so by the statute redeemed from the sale within twelve months. On August 15, 1908, the Interstate Bank and Trust Company sued out an execution on its deficiency decree, paid to the sheriff the amount required to redeem from the master's sale, (which amount was accepted by Edgar A. Strause,) and caused the execution to be levied upon the premises as provided by statute. On October 13, 1908, the premises were sold under this execution to appellee, and on December 13, 1908, the sheriff, in pursuance of the certificate of purchase issued at the time of the sale, executed to appellee a deed to the premises. It is under this deed that appellee claims title.

The only question for our determination is, whether a mortgagee who has secured a deficiency decree after the sale of the mortgaged property in foreclosure proceedings is such a decree creditor as is entitled, under the statute, to redeem the premises sold.

Upon the sale of the premises to Strause under the foreclosure decree the liens of the two trust deeds upon which

the foreclosure suit was predicated were extinguished. Those liens no longer existed, and the complainant in the foreclosure suit had secured every benefit possible to be secured under such liens. The debt itself, however, was not extinguished. A portion of it remained unsatisfied by reason of the failure of the property to sell for the full amount of the indebtedness. Under such circumstances the creditor, if personal service has been had upon the debtor, may have a deficiency decree for the balance due, upon which execution may issue as on a money decree, (Hurd's Stat. 1909, chap. 95, sec. 16,) or he may bring his action at law and secure judgment for the balance due. Such deficiency decree or judgment is secured by no lien whatever. It is not based upon the lien of the mortgage, but upon the personal liability of the mortgagor to pay the full amount of the indebtedness secured by the mortgage. A creditor with such a decree or judgment is on the same footing with any other decree or judgment creditor of the debtor, and is entitled to employ the same means to enforce his decree or judgment.

Our statute, after making provision for the redemption of property sold under execution or decree by any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under him, within twelve months after the sale, provides: "If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises," etc. (Hurd's Stat. 1909, chap. 77, sec. 20.) Under this statute, which is plain and unambiguous in its terms, the Interstate Bank and Trust Company had a clear right to redeem the premises. To hold otherwise would not only have the effect of limiting the decree or judgment secured for the deficiency and putting it in a class by itself, but would work a hardship on the debtor. We have repeatedly held that a liberal construction is to be given to our

redemption laws, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible. (*Schuck v. Gerlach*, 101 Ill. 338; *Whitehead v. Hall*, 148 id. 253; *Strauss v. Tuckhorn*, 200 id. 75.) The object in allowing judgment creditors to redeem is to prevent a sacrifice of the debtor's estate, and to allow as many of his judgment creditors as can, to secure the payment of their judgments by making an advance which the debtor cannot or will not make himself. (*Sawczy v. Chandler*, 11 Ill. 445.) In this case appellants did not redeem, but their failure to redeem within twelve months did not deprive them of all interest in the premises. They still had an equity, which would not be extinguished until the full period of redemption had passed and a deed had issued to the purchaser. (*Lightcap v. Bradley*, 186 Ill. 510.) It is a matter of common knowledge that real estate values, either from general or local causes, make sudden and material advances. To deprive a creditor in a deficiency decree of the right to redeem as a judgment creditor might in many instances prevent the debtor from securing the full value of his equity and the extinguishment of his debt.

It is insisted that a creditor cannot redeem from his own sale. No such general rule has been laid down by this court. On the contrary, in *Tewalt v. Irwin*, 164 Ill. 592, it was held that a creditor might redeem from his own sale. In that case Lagow foreclosed his mortgage against Tewalt. While the statutory period of redemption was running Tewalt died. The probate court allowed a claim against the estate in favor of Lagow. He assigned the claim to his attorney, who sued out a special execution and redeemed from the foreclosure sale. It was there contended that the redemption was, in fact, by Lagow and that he could not redeem from his own sale, but we held that a mortgagee who was also a creditor under a separate claim might redeem the premises from his own foreclosure sale, thus placing him in the same class with other debtors. The

precise question here involved has never been presented to us for decision, but we can perceive no difference, in principle, between the case at bar and the *Tewalt case*, *supra*. Under the statute, Lagow, in the *Tewalt case*, secured no greater rights by his judgment against the estate of Tewalt than were secured by the Interstate Bank and Trust Company through its deficiency decree. They were creditors with equal rights and on an equal footing.

By a mortgage or trust deed the grantor makes a conditional sale of his premises. Upon a failure of the grantor to comply with the conditions of his mortgage deed the grantee may foreclose and thus terminate the grantor's equity of redemption from his conditional deed. By foreclosure all the equity retained by the grantor by virtue of his conditional deed is extinguished, but by the statute the grantor in the conditional deed is given a further equity of redemption. This equity of redemption does not exist by virtue of the mortgage but is purely statutory. If the grantor does not redeem within the twelve months allowed him under the statute he still retains an equity, which is subject to sale within the succeeding three months by "any decree or judgment creditor" who will reimburse the purchaser at the sale, in the manner prescribed by the statute. There exists no reasonable foundation for a rule which would prevent the grantee in the conditional deed from subjecting this statutory equity to sale under his deficiency decree, and the statute plainly includes such a decree creditor within its terms.

In support of their contentions appellants rely, among other cases, upon *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 id. 170, *Lightcap v. Bradley*, *supra*, and *DeWitt County Bank v. Mickelberry*, 244 id. 77. The question here presented was not before us in any of those cases, and what was said there was said in reference to the matters then presented for our decision. Our holding here,

however, in no way conflicts with the holdings in those cases, but, on the contrary, is in entire harmony with them.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

FARMER, CARTWRIGHT and VICKERS, JJ., dissenting:

In our opinion the decision of the court in this case is contrary to our previous decisions and lays down a very harmful rule on the subject of redemption by judgment or decree creditors,—a rule not sustained, as we read and understand the decisions, by reason or authority. We do not agree that the statute gave the bank “a clear right to redeem the premises.” The eighteenth section of the chapter on judgments and decrees (Hurd’s Stat. p. 1365,) authorizes redemption by the mortgagors, or anyone interested in the premises through or under them, within twelve months. By the twentieth section it is provided that if redemption is not made by those authorized to redeem the premises within twelve months, “any decree or judgment creditor” may redeem within three months after the expiration of the twelve months. The opinion of the court holds that the bank was, at the time it redeemed, a decree or judgment creditor by reason of the fact that its decree was not satisfied by the sale, and as to the balance due, as found by the deficiency decree, it was a decree or judgment creditor within the meaning of the statute, and had full power and authority to redeem by virtue of the deficiency decree. To our minds it seems clear the legislature never intended by the use of the words “any decree or judgment creditor,” to authorize such a creditor to make successive sales of the debtor’s property by bidding at the first sale less than the amount of the decree, and then redeem from his own sale and re-sell the property which had been previously sold by virtue of, and to satisfy, the same decree. The bank procured a decree authorizing it to sell the premises to satisfy its mortgages. When it sold at the foreclosure sale the

purpose of obtaining the decree was accomplished, the authority given by virtue of the decree executed and the property discharged from all liability to be sold again to satisfy a portion or balance of the same decree, and the situation was not avoided or altered by authorizing an execution to issue for a deficiency. If the mortgagor had other property liable to execution it could be sold to satisfy the deficiency, but the mortgaged premises could not lawfully be again sold to pay the same debt. The deficiency was a part of the same decree to satisfy which the mortgaged premises had been once sold. Redemption laws are to be construed liberally, but this does not require our statute to be construed to place the mortgagor at the mercy of the mortgagee. The result of the construction given the statute by the court will lead to harsh and unjust consequences never contemplated or intended by the legislature. The decree in this case authorized the sale of the property for the payment of the entire amount due the bank on both of its mortgages. It did not authorize two sales, nor successive sales until the debt was paid. The bank presumably knew the value of the property and had it in its power to bid its fair cash value, and the presumption is that it did so. It was not intended by the statute on redemption, and is contrary to the policy of the law, that a mortgagee be permitted, at the foreclosure sale, to suffer the property to be sold for less than its fair value, and if not redeemed by the mortgagor, or some one claiming through or under him, that then the mortgagee may redeem from the sale made by him and again sell the same property for the payment of a part of the same indebtedness. To permit this to be done would subject the mortgagor to great disadvantage. His property may be sold for less than its value and less than the amount of the decree it is sold to satisfy. If he does not redeem from the sale and no one else redeems, the title will pass from him without his having received the value of it in satisfaction of his indebtedness. If he re-

deems, then the property is again subject to be sold to satisfy the remainder due under the decree. If the bank had the right to redeem under a deficiency decree, it had the right, and it would be the right of any other mortgagee in a foreclosure sale, to pursue that course and make it possible to acquire title to the property for less than its fair value, and leave the debtor liable for a part of the amount that would have been satisfied if he had received the benefit of the value of the property by the sale under the decree. This view is sustained by *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 id. 170, and *Lightcap v. Bradley*, 186 id. 510.

This court said in the *Ogle* case, on page 179: "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose and the property is no longer subject to it. * * * When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage; but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all the property of a debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien. * * * It is idle for the senior mortgagee to urge that the property

redeemed is, in fact, worth much more than the price for which it was sold at the foreclosure sale. He was a competent bidder at such sale, and therefore had it in his power to bid the property up to its fair cash value, and if he failed to do so, a presumption arises, from which he cannot escape, that the property sold for what it was reasonably worth. At any rate, the mortgagee under whose decree the mortgaged property is sold, in the absence of all irregularity and unfairness in the sale, must be conclusively held to the price bid as a full equivalent for and satisfaction of his lien, and having received the proceeds of the sale he becomes a mere stranger to the property."

In *Lightcap v. Bradley* the court approved the *Ogle case*, and said (p. 526): "The sale of premises under a decree of foreclosure, where the decree does not expressly save any right to resort to the land again, is an absolute discharge of the premises from the lien. In the absence of a provision for another sale the premises will be discharged, even from unmaturing portions of the debt. (*Rains v. Mann*, 68 Ill. 264.) Such a sale is a sale of the land and of all interests, both that which the mortgagor had at the execution of the mortgage and the interest of the mortgagee and other parties to the suit. It is made by the court as vendor, and a sale discharges the land from the lien and transforms it into the statutory lien by the certificate of purchase."

In the case of *Tewalt v. Irwin*, 164 Ill. 592, cited in the opinion of the court, no question of a sale under a deficiency decree or a sale to satisfy a balance on a decree under which the premises had been previously sold was involved.

In our opinion the judgment of the circuit court and the judgment of the Appellate Court are wrong and should be reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. J. ALLEN COTTON, Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 9, 1911.

1. **INDICTMENT**—*what allegation includes element of want of authority to alter mortgage.* An allegation in an indictment that the defendant falsely and feloniously altered and changed a chattel mortgage necessarily includes the element of a want of lawful authority to make the alteration.

2. **SAME**—*when indictment in language of statute is sufficient.* If the language of the statute creating an offense is readily understood, an indictment charging such offense in the language of the statute is sufficient.

3. **EVIDENCE**—*contents of lost record may be proved by verbal testimony.* The contents of a lost or destroyed record may be proved by verbal testimony, like any other writing; and the mere fact that an uncertified copy of the record of a chattel mortgage, contained in the lost docket of a justice of the peace, is used in evidence before the master in a foreclosure proceeding, does not restrict the People, in a prosecution for falsely altering the mortgage, to the use of such copy to prove the docket record.

4. **SAME**—*court may permit party to call attention of witness to his testimony if he seems forgetful.* Where a witness seems to have suddenly become remarkably forgetful about matters he has already testified to, the court may, in its discretion, permit the party calling the witness to direct his attention to his former testimony concerning the matters, either to refresh his memory or awaken his conscience.

5. **INSTRUCTIONS**—*it is not error to state the law to the jury in the language of the law.* It is proper, in a criminal prosecution for falsely altering a mortgage, to give an instruction repeating the language of sections 8 and 9 of division 2 of the Criminal Code, declaring what constitutes an offense and by what means intention is manifested, as it is not error to give the jury the law in the language of the law itself.

6. **SAME**—*when an instruction as to considering interest of defendant is not incorrect.* An instruction advising the jury that the interest of the defendant in the trial is a matter to be properly taken into consideration in weighing his testimony is not incorrect, where it does not authorize the jury to disregard his testimony or that of any other witness.

7. SAME—*when an instruction as to proof of guilt by circumstances is not incorrect.* An instruction in a criminal case stating that while the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, the proof need not be the direct evidence of persons who saw the offense committed, but that the acts constituting the crime may be proved by circumstances, is not incorrect. (*Otmer v. People*, 76 Ill. 149, distinguished.)

8. SAME—*mere redundancy of instructions not relating to any fact is not ground for reversal.* A mere redundancy of instructions upon the subject of reasonable doubt, or other matters not relating to any fact, is not ground for reversal.

9. SAME—*when venue of a crime is sufficiently proved.* In a prosecution for falsely altering a chattel mortgage after its execution, proof that the mortgage was made in the county where the prosecution is had and that the defendant attempted to collect it there and instituted a foreclosure proceeding for that purpose, justifies the inference that such county was the place of forgery.

10. SAME—*when failure of People to prove want of authority to alter mortgage is not material.* Failure of the People to prove want of authority to alter a chattel mortgage after its execution is not material, where the defendant testified that he made the alteration before the mortgage was executed and never claimed he made it afterwards.

11. SAME—*when the verdict will not be disturbed on the facts.* Where the guilt or innocence of the accused depends upon the credibility of the witnesses the verdict of the jury will not be disturbed by the court of review on the facts, if there is no controlling fact or circumstance from which that court is able to say that the verdict is wrong.

FARMER, VICKERS and COOKE, JJ., dissenting.

WRIT OF ERROR to the Circuit Court of Peoria county;
the Hon. LESLIE D. PUTERBAUGH, Judge, presiding.

SUCHER & MCNEMAR, (DAILY & MILLER, of counsel,) for plaintiff in error.

W. H. STEAD, Attorney General, ROBERT SCHOLES, State's Attorney, and FRED H. HAND, (HARRY E. PRATT, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, J. Allen Cotton, was found guilty by a jury in the circuit court of Peoria county of the forgery of a chattel mortgage by adding to the property therein described and mortgaged the words and figures "1 Singer sewing machine," with intent to prejudice, damage and defraud the mortgagors, Grant Mitchell and Dora Mitchell, his wife. The court overruled motions for a new trial and in arrest of judgment and pronounced sentence in accordance with the verdict.

The mortgage was given to secure rent of a house of the defendant occupied by the mortgagors, and one of the mortgagors, Grant Mitchell, died before the trial. Dora Mitchell testified that the figure and words "1 Singer sewing machine" were not in the chattel mortgage when she signed it, and that the sewing machine was her own property and of the value of \$60. The mortgagors acknowledged the mortgage before John Schofield, a justice of the peace, who entered the mortgaged property on his docket, and the justice and one Richard H. Radley, who received the docket from the justice, testified that the figure and words in question did not appear on the docket. The defendant and Henry Gibson testified that the mortgage was made out in the office of the justice of the peace; that the writing in the printed blank was done by the defendant; that he had a list of the articles to be mortgaged on the inside cover of a small receipt book, including the sewing machine as the last item; that Gibson read off the list of articles, and after the mortgage was completed they checked the list and found the Singer sewing machine had been omitted, and that the defendant then wrote the figure and words in the chattel mortgage following the description of the other property. The justice said that he thought the sewing machine was mentioned between the defendant and

Gibson, but his impression was that the defendant told Gibson he did not want the machine and that he had enough without it. A witness testified that Dora Mitchell told him that she said the sewing machine was not on the chattel mortgage to save herself, because she had mortgaged the goods to another person, but she denied that she made any such statement. Another witness testified that after a fire which occurred in the house he saw the defendant look toward the sewing machine and take a book with a wine-colored or brown leather back and write something on it.

It is first contended that the indictment was insufficient for want of an averment that the writing was made without lawful authority. The indictment was in the language of the statute and the language was such as to be readily understood, which was sufficient. It alleged that the defendant falsely and feloniously altered and changed the chattel mortgage, which necessarily included the element of a want of lawful authority.

The next proposition of counsel is, that the court erred in permitting the justice and the other witness to testify that the words and figure alleged to have been forged did not appear on the justice's docket. The docket had been lost and the entry had been copied as a part of the evidence taken before the master in chancery. The argument is that the People should have proved the contents of the docket by the copy, which was not a certified copy. Where records are lost or destroyed their contents may be proved by verbal testimony, like any other writing. (*Gage v. Schroder*, 73 Ill. 44; *Ashley v. Johnson*, 74 id. 392.) The only purpose of the evidence was to prove that the figure and words were not on the docket and not to prove what was on it, and for that purpose a copy of the entry would not have been a higher class of evidence than the testimony of witnesses who had examined the docket. The defendant wanted to have the copy used because the mortgage described, among other things, "1 cooking stove and

cooking utensils" while the docket entry was "1 cooking stove and utensils," which, it is said, would have shown a want of accuracy on the part of the justice. The defendant offered in evidence the copy and had the benefit of any inference arising from the discrepancy.

It is next contended that the judgment ought to be reversed on account of improper conduct by the State's attorney in the examination of A. J. Saunders, a witness called on behalf of the People. The State's attorney did nothing improper and the real complaint is against the rulings of the court. The witness had testified touching the matter before and developed an unusual and remarkable forgetfulness and lapse of memory, and the court permitted the State's attorney to call the attention of the witness to his former testimony for the purpose of refreshing his recollection. If a witness gives testimony different from previous statements, so that his testimony is a matter of surprise to the party calling him, the party may refresh his memory by calling his attention to the former statement, either to refresh his memory or awaken his conscience. (*Chicago City Railway Co. v. Gregory*, 221 Ill. 591; *People v. Lukosius*, 242 id. 101.) We see no reason why the same rule should not apply where a witness claims that his mind has become an entire blank concerning matters about which he has previously testified. The permission to ask such questions rests largely in the discretion of the court, who can judge from the manner of the witness and his appearance whether they ought to be permitted, but in this case the failure of memory was so surprising as to indicate intentional forgetfulness, and, judging the ruling by the record alone, we are satisfied the court did not err.

Errors are assigned upon the giving of instructions, and as to the first instruction the objection is that it states an incorrect rule in saying that an intent to defraud may be manifested from circumstances. The instruction is a copy of sections 8 and 9 of division 2 of the Criminal Code,

declaring what constitutes a criminal offense and by what means intention is manifested. There can be no dispute of the law as made by the legislature, and it is a self-evident proposition that to give the jury the law in the language of the law itself is not error. (*Petefish v. Becker*, 176 Ill. 448; *Donk Bros. Coal and Coke Co. v. Peton*, 192 id. 41.) The same may be said of instruction No. 2, which is a copy of the statute defining the crime of forgery so far as applicable to this cause. Counsel say that it is wrong in describing the intent as "intent to prejudice, damage or defraud any person," while the statute says the intent must be to "prejudice, damage and defraud." A reference to the statute will show the error of counsel, since the language of the statute is precisely the same as that of the instruction.

Instruction No. 10 related to credibility, and evidently referred to the testimony of the defendant, although it apparently referred to something going before which was omitted. It advised the jury that the interest of the defendant in the trial was a matter proper to be taken into consideration by them in determining the weight to be given to his testimony, but it did not authorize the jury to disregard the testimony of the defendant or any other witness, and it was not incorrect.

The fourth instruction stated that while the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, the proof need not be the direct evidence of persons who saw the offense committed, and that the acts constituting the crime might be proved by circumstances. Counsel liken the instruction to one held bad in *Otmer v. People*, 76 Ill. 149, but there is no resemblance between them. This instruction did not intimate that testimony of facts and circumstances merely pointing to the defendant's guilt would be sufficient.

Several instructions were given as to what constitutes a reasonable doubt, and it is objected that the duty to instruct on that subject was overdone. It has often been

doubted whether such instructions make the meaning of the words "reasonable doubt" more clear than the words without comment, and the instructions in this case were practical repetitions. They consisted of statements made by the courts at different times in efforts to explain the meaning of the words, and a mere redundancy of instructions not relating to any fact would not justify a reversal.

Finally, it is contended that the court erred in not granting a new trial on the ground that the verdict was not supported by the evidence, and under that head it is insisted that the venue was not proved. The chattel mortgage was made and acknowledged in Peoria county, and the defendant attempted to collect it there and instituted a foreclosure proceeding for that purpose. These facts would justify an inference that the place of forgery was in Peoria county. (*Bland v. People*, 3 Scam. 364; *Langdon v. People*, 133 Ill. 382; *People v. McIntosh*, 242 id. 602.) It is also urged that there is no proof of a want of authority to make the change after the execution of the mortgage, but the defendant testified that he wrote in the figure and words before the mortgage was executed and never claimed that he inserted them afterwards, so that the question of authority is of no importance. The question of guilt or innocence depended upon the credibility of the witnesses, and there is no controlling fact or circumstance from which we are able to say that the verdict was wrong. The chattel mortgage and the receipt book with a brown cover were in evidence and were certified to this court. The inside cover of the receipt book contains a list of articles, including the sewing machine. In the chattel mortgage there are diagonal lines across the blank space below the description of the property, and the paper presents an appearance of the figure and words having been written after the other property, somewhat closer together, and the word "machine" runs beyond the printed border line. It looks as though the figure and words were written in after the diagonal

lines were drawn, but the appearance of the mortgage is not inconsistent with the testimony of either party.

We find no reason which would justify a reversal of the judgment, and it is affirmed. *Judgment affirmed.*

FARMER, VICKERS and COOKE, JJ., dissenting.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, *vs.* SERENES T. SCHREIBER, Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 7, 1911.

1. CONSTITUTIONAL LAW—*act to punish frauds in practice of law is within its title.* The act "to prevent and punish frauds in the practice of law," (Hurd's Stat. 1909, p. 775,) reasonably embraces the punishment of persons residing in this State who hold themselves out as entitled to practice law when they have no right to do so, and the provisions of the act are therefore within its title.

2. SAME—*act to punish frauds in the practice of law is not special legislation.* The fact that the act to prevent and punish frauds in the practice of law applies only to persons residing in this State who hold themselves out as entitled to practice law without being licensed to practice in the courts of this State does not render the act unconstitutional as special legislation.

3. CRIMINAL LAW—*when information is sufficient.* An information charging a statutory offense in the language of the statute is sufficient if the statute itself sufficiently defines the offense.

4. SAME—*when party is guilty of fraud in the practice of law.* A resident of Illinois who, having no right to practice law, maintains an office where he makes collections, draws conveyances, examines abstracts, negotiates loans and advises parties of their legal rights, styling himself "Collection Attorney" and forming connections with collection agencies, is guilty of a violation of the act to prevent and punish frauds in the practice of law, though he does not try cases in courts of record.

5. SAME—*what does not prevent violation of an act to prevent frauds in the practice of law.* Where an office and office force are maintained by a resident of Illinois who is engaged in the law business without being admitted to the bar, he cannot escape the

penalty of the act to prevent and punish frauds in the practice of law by styling himself "Collection Attorney," or using some other word before "attorney" which would indicate to the public that he was specializing in some particular branch of the law.

WRIT OF ERROR to the County Court of Winnebago county; the Hon. LOUIS M. RECKHOW, Judge, presiding.

B. A. KNIGHT, (G. E. JOHNSON, of counsel,) for plaintiff in error.

W. H. STEAD, Attorney General, HARRY B. NORTH, State's Attorney, and FRED H. HAND, for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an information filed by the State's attorney of Winnebago county, in the county court of said county, charging Serenes T. Schreiber, the plaintiff in error, with having violated section 1 of an act entitled "An act to prevent and punish frauds in the practice of law," by holding himself out as an attorney at law and by representing that he was authorized to practice law when he had not been regularly licensed to practice law in the courts of this State, which section of the statute reads as follows: "That any person residing in this State not being regularly licensed to practice law in the courts of this State, who shall in any manner hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25) dollars, nor more than five hundred (\$500) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court, for each and every offense, said misdemeanor to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 38 of the Revised Statutes of Illi-

nois." (Hurd's Stat. 1909, p. 775.) A motion to quash the information was made and overruled and the plea of not guilty was entered, and upon a trial before a jury plaintiff in error was found guilty, and the court, after overruling a motion for a new trial and in arrest of judgment, entered judgment on the verdict, sentencing the plaintiff in error to pay a fine of \$300 and the costs of prosecution, and that he be committed to the county jail of Winnebago county until the fine and costs were paid. This writ of error has been sued out to review the judgment entered by the county court.

It is contended that the act under which the plaintiff in error was convicted is unconstitutional, (1) on the ground that the title of the act is insufficient; and (2) that the act discriminates against residents of this State and in favor of residents of foreign States. We are of the opinion both contentions are without force. The act was designed to prevent persons who reside in this State and who were not duly licensed to practice law in this State from imposing upon the public by holding themselves out as duly licensed attorneys at law or from representing to the public that they were authorized to practice law. For a person who has not been admitted to the bar in this State to hold himself out as a duly licensed attorney at law or to represent that he is authorized to practice law in this State would be a gross fraud, and such action would bring the offender clearly within the language of an act framed with the design to prevent and punish frauds in the practice of law. It has been held by this court that any means which are reasonably adapted to secure the object indicated in the title of an act may be included within the body of the act, (*Larned v. Ticrnan*, 110 Ill. 173,) and if by any fair intendment the provisions in the body of an act have a necessary or proper connection with the title of the act, such provisions are not objectionable. (*Hudnall v. Ham*, 172 Ill. 76.) And it would seem too clear for argument that a

statute which prohibits persons in this State from holding themselves out as attorneys at law who have not been regularly admitted to the bar and who have no right to practice law in this State would reasonably tend to prevent fraud in the practice of law, and that such an enactment would have a necessary and proper connection with the title, which states the act which is to follow is one for the prevention and punishment of frauds in the practice of law. We are of the opinion the title of said act is sufficient and that the body of the act is within the title.

The contention that the act discriminates against persons residing in this State and in favor of persons residing outside the State is based upon the view that while the act prohibits persons that reside in the State from practicing law without having been admitted to the bar, the citizens of other States may come within this State and practice law in the courts of this State without being admitted to the bar of this State. Such is not the effect of the statute. The statute was not passed for the purpose of reaching all classes of citizens. It was a fact well known to the legislature when it passed the act, that within the State there were persons who had never been admitted to the bar, or who had been admitted to the bar and whose licenses authorizing them to practice law in this State had been revoked, who, in defiance of the law, were fraudulently holding themselves out as attorneys at law and authorized to practice law, and imposing upon and often defrauding the public by leading it to believe that they were regularly licensed attorneys at law, and this class included the persons sought to be reached by the statute. The enforcement of this statute will have no effect upon a reputable lawyer residing in a foreign State who may temporarily desire to represent a client in this State, as he may rightfully do so as a matter of comity, and non-resident unlicensed attorneys will not come into this State to practice law, and if they should, by reason of their non-residence and want of a

permanent location and lack of acquaintances they would be unable to find victims upon whom to practice their wiles. The unlicensed non-resident, therefore, who might desire to practice law in this State differs from the non-resident drummer or peddler who goes into a State other than that in which he resides to sell his goods and wares, and the principles of law which apply to the latter classes have no application to the non-resident who has not been admitted to the bar, and who, possibly, might desire to practice law in this State. The statute applies to every resident of this State who holds himself out as an attorney at law or who represents himself as authorized to practice law and who has not been regularly licensed to practice law or whose license has been revoked. The statute is not special or discriminatory legislation but a valid constitutional enactment.

It is next contended that the court erred in overruling the motion to quash. The information charged, in each count, the offense substantially in the language of the statute. It does not charge a common law offense, and where the offense is statutory it is sufficient to allege it in the words of the statute, provided it sufficiently defines the crime. (*Strohm v. People*, 160 Ill. 582; *Meadowcroft v. People*, 163 id. 56; *McCracken v. People*, 209 id. 215.) The information was, therefore, sufficient.

It is further urged that the court misdirected the jury as to the law of the case. We have examined the instructions given on behalf of the People as well as the defense, and those refused which were offered by the defendant. The issues were simple and the evidence of guilt was clear. We are of the opinion the jury were properly advised as to the law of the case.

It is finally stated the verdict is not supported by the evidence. It appears that the plaintiff in error maintained an office in the city of Rockford; that it consisted of a main office and a consultation room; that he employed a stenographer; that he had quite a pretentious law library;

that his business consisted of making collections, preparing conveyances, examining abstracts, negotiating loans, closing real estate deals, advising parties as to their legal rights, and generally performing such services for his clients as are usually performed by attorneys at law, and that he stated to his clients that he was a lawyer; that upon his office door and window and office stationery he had his name, followed by the words "Collection Attorney," and that he had formed a connection with attorneys and collection agencies throughout the United States and Canada, with whom he exchanged business; that he did all the law business he could get to do, with the exception that he says he did not try cases in courts of record. It is obvious the plaintiff in error was holding himself out as an attorney at law. He urges, however, that as he placed the word "collection" before the word "attorney" upon his signs and advertisements he is not guilty of a violation of the statute. Where an office and office force are maintained by a party who is engaged in the law business without having been duly admitted to the bar, he cannot escape the pains and penalties of the statute by placing after his name and before the word "attorney" some word or phrase which, at most, only shows to the ordinary observer that he is specializing in the practice of law. The evidence fully establishes that the plaintiff in error was holding himself out as authorized to practice law without being regularly licensed to practice law, and upon his own showing he was guilty of a violation of the statute.

Finding no reversible error in this record the judgment of the county court will be affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. CHRIST NOLAN, Plaintiff in Error.

Opinion filed April 19, 1911—Rehearing denied June 8, 1911.

1. CRIMINAL LAW—*indictment for robbery need not accurately describe article taken.* The gist of the offense of robbery is the force or intimidation and the taking from the person of another, against his will, of a thing of value belonging to him or in his custody, and it is not essential that the indictment shall accurately describe the article taken.

2. SAME—*an indictment for robbery describing article taken as "one pin of the value of \$400" is sufficient.* An indictment for robbery which describes the article taken as "one pin of the value of \$400" is sufficient to sustain a conviction under evidence describing the article taken as a "diamond stud," or a "stud solitaire with a screw" or "spiral."

CARTWRIGHT and VICKERS, JJ., dissenting.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. ALBERT C. BARNES, Judge, presiding.

LOUIS GREENBERG, and JOHN F. TYRRELL, for plaintiff
in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and FRED H. HAND, (THOMAS MARSHALL, and CLAUDE F. SMITH, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Sidney Campbell, Robert Boyd, Frank Noonan and the plaintiff in error, Christ Nolan, were indicted at the September term, 1907, of the criminal court of Cook county for robbing Maurice A. Schenick, on the 13th day of August, 1907, of "one pin of the value of \$400." Noonan was acquitted, and Campbell, Boyd and the plaintiff in error were found guilty under said indictment. The case as to Campbell was considered by this court in *People v. Camp-*

bell, 234 Ill. 391. The facts as to the robbery are sufficiently set out in that opinion and need not be re-stated here.

It is contended that the property is not sufficiently described in the indictment to comply with section 9 of article 2 of the constitution, which provides that "the accused shall have the right * * * to demand the nature and cause of the accusation," etc.; and it is further contended that there is a variance between the proof and the indictment, the latter describing the property as "one pin," while in the evidence it is called a "diamond stud," a "stud solitaire with a screw" or "spiral." The gist of the offense of robbery is the force or intimidation, and the taking from the person, against his will, of a thing of value belonging to him. In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property taken, further than to show it was the property of the person assaulted or in his care, and had a value. (*Burke v. People*, 148 Ill. 70; *Schroeder v. People*, 196 id. 211.) The words "pin" and "stud" were both used in referring to this identical property in *People v. Campbell*, *supra*, and no question was raised, either by counsel or the court, that the property was not properly described as "one pin" in the indictment or that the terms "pin" and "stud" could not be used interchangeably. Webster defines a pin as "an ornament * * * fastened to the clothing by a pin; a piece of wood, metal, etc., generally cylindrical, used * * * as a support by which one article may be suspended from another." (New Int. Dict.; see, also, Standard Dict.) In *Rex v. Moore*, 1 Leach, 335, an ornament was described in the indictment as "one diamond pin." In commenting on this case in 2 Russell on Crimes (6th ed. p. 88,) the author describes this ornament as "a heavy diamond pin, with a cork-screw stalk twisted in a lady's hair." In this case the diamond ornament was fastened to or suspended from the shirt by a cork-screw piece of metal. Manifestly, under the authorities cited the property in ques-

tion was correctly described as a pin. This question was not raised on the trial below by plaintiff in error or his counsel. Evidently he was not misled as to the property described in the indictment. An indictment for robbery sufficiently describes the property taken if it enables the jury to identify the chattels stolen with those referred to in the indictment. *State v. Burke*, 73 N. C. 83; *State v. Sanders*, 14 N. Dak. 203; *People v. Richards*, 136 Cal. 127; 34 Cyc. 1804.

We find no reversible error in the record. The judgment of the criminal court will be affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT, dissenting:

A stud is not a pin, either in common parlance or according to any lexicographer. It is defined as "a detachable, button-like device made in various forms, to be inserted through one or more button-holes or eyelets and serve as a fastener, for ornament, etc." (Webster's New Int. Dict.) In *King v. Moore*, 1 Leach, 335, the indictment was for robbery, and the only question raised or considered was whether the taking was with sufficient force to constitute that crime. The ornament consisted of seven buttons of peculiar brilliancy, fixed on a long silver screw-stock of considerable weight, which was very deeply twisted into the hair of the owner, and her hair was strongly craped all around it. It was not a stud and bore no resemblance to one, and while the question whether it was a pin was not considered, the fact that a part of an ornament is not straight, or is bent or curved for greater security, would not change its character, provided it is, in fact, a pin.

Mr. JUSTICE VICKERS: I concur in the dissenting opinion of Mr. Justice Cartwright.

SALLIE M. THOMAS, Plaintiff in Error, vs. M. S. THOMAS,
Defendant in Error.

Opinion filed April 19, 1911—Rehearing denied June 19, 1911.

1. PLEADING—*when matters set up by a cross-bill are germane to original bill.* A cross-bill in a divorce suit alleging that the complainant had left the defendant's home and set up a separate establishment, and averring that certain children had been born of the marriage and praying for their care and custody, is germane to the original bill in the sense that the two relate to the same matter, even though the original bill made no reference to children.

2. SAME—*filing original bill for divorce gives court jurisdiction of minor children of the parties.* By virtue of the statute the filing of an original bill for divorce brings the minor children of the parties within the jurisdiction of the court, and upon application of the parties the court may make any proper order respecting their custody pending suit, and if a divorce is decreed may make such order respecting their care and custody as is reasonable and just according to the circumstances of the case.

3. SAME—*matters arising after a suit is at issue must be presented by cross-bill.* A defense based upon facts arising after a chancery cause is at issue cannot be availed of by the defendant by plea or answer, but the defendant must make it the subject of a cross-bill, for the same reason that a complainant must bring in by supplemental bill matters occurring after filing original bill.

4. SAME—*cross-bill seeking no relief not obtainable by answer should be dismissed.* If a cross-bill is filed which seeks no discovery and no affirmative relief which the defendant cannot obtain by answer to the original bill, the cross-bill may be dismissed on answer, motion or demurrer.

5. SAME—*the statute precluding dismissal of bill applies only where cross-bill seeks affirmative relief.* The statute which precludes a complainant's dismissal of the original bill after the defendant has filed a cross-bill applies only where the cross-bill asks for affirmative relief, as complainant cannot be compelled to prosecute a suit merely to enable the defendant to present a defense.

6. SAME—*cross-bill seeking affirmative relief requires equity to support it.* A cross-bill which is filed merely as a mode of defense to bring into the case matters occurring after the cause is at issue requires no equity to support it, but a cross-bill seeking affirmative relief is in the nature of an original bill, and the relief sought must be such as the court, in point of jurisdiction, is competent to administer.

7. SAME—*matters contained in cross-bill must be such as would authorize an original bill.* A cross-bill seeking affirmative relief must be germane to the subject matter of the original bill, but it is, in fact, a separate and distinct suit, and the matters contained therein must be such as might have been the subject of an original bill, otherwise the filing of the cross-bill does not deprive the complainant of the right to dismiss the original bill.

8. DIVORCE—*when cross-bill in divorce suit is unnecessary.* A cross-bill in a divorce suit which merely sets up facts tending to show that the defendant had not deserted the complainant, as alleged, but that she had deserted him, and alleging the existence of certain children of the parties and praying for their care and custody but not praying for a divorce, relates to matters equally available by answer and is unnecessary, and the complainant has the right to dismiss the original bill notwithstanding the cross-bill.

9. SAME—*Divorce act does not authorize bill solely for care and custody of children.* The Divorce act does not authorize the maintaining of an original bill by a husband or wife against the other for the sole purpose of obtaining the care and custody of their children, as the court, under that act, can only make orders concerning the care and custody of children during the pendency of a divorce suit, or upon final hearing when a divorce is decreed.

10. SAME—*bill filed solely to obtain custody of children cannot be maintained under general chancery powers.* The jurisdiction of a court of chancery over minor children as wards of the court depends upon the acquiring of jurisdiction of the person of the particular child and the subject matter by the commencement of some recognized proceeding in the court, and does not authorize the maintaining of a bill by a husband or wife against the other solely to obtain the care and custody of their children.

11. SAME—*court cannot decree care and custody of children unless a divorce is granted.* Neither a want of harmony between a husband and wife relating to the management of their children nor the right of either to their custody, control, support or education involves any equitable title or question of an equitable nature such as authorizes a court of equity to decree the care and custody of children, as between their parents, except as provided by the Divorce act in case a divorce is granted. (*Cowles v. Cowles*, 3 Gilm. 435, distinguished.)

12. MINORS—*jurisdiction of a court of equity to appoint guardians is not based upon equitable rights.* Courts of equity have power to appoint guardians for infants, but that power exists in Illinois by inheritance from the English court of chancery and not because equitable rights or titles are involved.

CARTER, J., dissenting.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

FOLLANSBEE, McCONNELL & FOLLANSBEE, and CLYDE E. SHOREY, for plaintiff in error.

C. H. POPPENHUSEN, and JOSEPH L. McNAB, (S. S. GREGORY, of counsel,) for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On July 17, 1908, plaintiff in error, Sallie M. Thomas, filed her bill for divorce in the superior court of Cook county against defendant in error, Morris St. P. Thomas, on the ground of desertion. An answer was filed on August 21, 1908, denying the charge of desertion, but no mention was made in the bill or answer of the existence of any children of the marriage. On October 29, 1908, the defendant filed his cross-bill, reciting evidence tending to show that he had not deserted his wife but that she had deserted him, which was followed by a statement that she had deserted him and averments that two boys were born of the marriage, Benjamin M. Thomas, then thirteen years old, and Carr M. Thomas, ten years old, and that Benjamin was living with Mr. Thomas and the younger boy, Carr, was with his mother. The cross-bill did not seek a divorce but prayed for the care, custody, education and control of the two children and that Mrs. Thomas be enjoined from interfering therewith, and for such other and further relief as equity might require. Mrs. Thomas answered the allegation of the cross-bill that she had deserted her husband by denying it and demurred to the remainder, which set forth the birth of the children and matters relating to them and their custody. The court overruled the demurrer, and

Mrs. Thomas electing to stand by it, the cross-bill was ordered to be taken as confessed. When the cause was reached for hearing on the original bill and answer thereto and the cross-bill taken as confessed, Mrs. Thomas moved the court to dismiss her bill without prejudice for want of prosecution, but Mr. Thomas objected and the motion was denied. Mrs. Thomas offered no evidence in support of her bill and the cause was heard upon the cross-bill taken as confessed, but her solicitor appeared and contested the right to a decree on the cross-bill. The solicitor for Mr. Thomas informed the court that a divorce was not wanted, and the relief sought by the cross-bill was the custody of the children. The court entered an order finding that Mr. Thomas was a fit person to have the custody, control and education of the children and giving him the same and enjoining Mrs. Thomas from interfering therewith, and ordering her to bring or send the boy Carr into the State and deliver him to her husband within thirty days. She did not comply with that order, and a final decree was entered dismissing her original bill for divorce, granting the prayer of the cross-bill and adjudging the costs of the suit against Mrs. Thomas. She prayed an appeal to the Appellate Court for the First District, which was allowed and perfected. The Appellate Court affirmed the decree and we granted a writ of *certiorari*, in pursuance of which the record is now under review.

The original bill prayed for a divorce on the ground of desertion. The cross-bill stated in detail that Mrs. Thomas had gone on a visit to Wisconsin and had not returned to the family home but set up a separate establishment a few blocks distant and had afterward gone to Sioux Falls, South Dakota, all of which was intended to show that the separation was her act, but the cross-bill did not ask for a divorce. Its prayer and its purpose were merely to obtain the care, custody, control and education of the two boys,

and so much of the cross-bill as alleged facts concerning them and asked for their custody was demurred to on the ground that such matters were not germane to the original bill. Because the original bill stated nothing about the existence of any children of the marriage, it was insisted, by demurrer, that matters concerning their custody could not be made the subject of a cross-bill. The facts set up in the cross-bill were germane to the subject of the original bill in the sense that they related to the same matter. The custody of the children was necessarily comprehended within the scope of the original bill although nothing was said about them. The filing of the original bill for divorce brought within the jurisdiction of the court the minor children of the parties by virtue of the statute, which authorizes the court, on application, to make such order concerning the custody and care of children during the pendency of the suit as may be deemed expedient and for the benefit of the children, and if a divorce shall be decreed the court may make such order touching the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just. The cross-bill was not bad on account of the reason alleged in the demurrer, and when the demurrer was overruled Mrs. Thomas was still prosecuting her suit for divorce. The court did not err in overruling the demurrer, but the situation was afterward changed by the motion of Mrs. Thomas to dismiss her bill and her refusal to prosecute it further, and if the court could not grant the relief sought by the cross-bill regardless of the prosecution of the original bill, the decree must be reversed.

The statute provides that after a cross-bill has been filed the complainant shall not be permitted to dismiss his bill without the consent of the defendant, and when Mrs. Thomas attempted to dismiss her bill the court denied her

motion. A cross-bill may be filed purely as a matter of defense based upon facts arising after the cause is at issue. In such a case a defendant cannot avail himself of the defense by plea or answer, but must make it the subject of a cross-bill for the same reason that a complainant can only bring into the suit matters occurring after the filing of his bill by a supplemental bill.* (*Jenkins v. International Bank*, 111 Ill. 462.) The cross-bill in this case was not filed purely as a matter of defense to the bill for divorce based upon facts arising after the filing of the original bill, and if it had been it would not have justified the court in refusing to allow Mrs. Thomas to dismiss her bill. The statute only applies to a cross-bill asking for affirmative relief, since it would be absurd to say that one who is merely defending can insist that the complainant shall remain in court in order that he may make a defense. The court could not compel Mrs. Thomas to prosecute her action for divorce against her will merely in order that Mr. Thomas should have an opportunity to prevent her obtaining it. The cross-bill was for the purpose of obtaining the custody of the children, and a defendant will not be permitted to file a cross-bill for an object which is equally available by an answer. (*Prichard v. Littlejohn*, 128 Ill. 123.) Any question relating to the custody of the children could have been raised by Mr. Thomas by his answer, and at any time after the original bill was filed such questions could have been brought before the court by an application for such custody, and upon granting a divorce the court could have awarded the custody to either party. Mr. Thomas could have fully set forth in his answer everything that was required for the protection of his rights as father of the children, and so far as the powers of the court under the divorce statute are concerned, the cross-bill was useless. If a defendant should file a cross-bill when he seeks no discovery and no affirmative relief that he cannot obtain by

answer to the original bill, his cross-bill will be dismissed either on answer or motion or demurrer. (*Edgerton v. Young*, 43 Ill. 464; *Morgan v. Smith*, 11 id. 194; *Wing v. Goodman*, 75 id. 159; *Akin v. Cassidy*, 105 id. 22; *Newberry v. Blatchford*, 106 id. 584; *Howe v. South Park Comrs.* 119 id. 101.) If the court had no other jurisdiction to award the custody of the children in controversy between the parents than that conferred by the divorce statute, the cross-bill interposed no obstacle to the dismissal of the original bill because Mrs. Thomas declined to prosecute her action for divorce and the cross-bill did not ask for a divorce and none was granted.

In England matrimonial causes were never under the jurisdiction of courts of equity, and in this country the jurisdiction is conferred by statute, which prescribes and limits the powers of the court. So far as the children are concerned, a court can, by virtue of the statute, only make orders concerning their custody during the pendency of the suit, or upon a final hearing where the divorce is decreed. Some courts have held that the custody of children can be granted to one of the parties to a divorce suit where a divorce is denied, or not granted, which is the same thing, but the decisions rest either on a statute conferring such power or upon supposed general equity powers of the court. In Alabama there is a statute giving courts of chancery power, in all cases of separation between husband and wife where neither party shall obtain a divorce, to give the custody and education of the children either to the father or mother, as may seem right and proper, and it was held that such an order could be made where there was an ineffectual attempt to procure a divorce. (*Cornelius v. Cornelius*, 31 Ala. 479.) We have no such statute but our divorce statute is to the contrary, and in this case there was not even an attempt to procure a divorce. In *Nelson on Divorce and Separation* (vol. 2, 979,) the author says that it is

not denied that a court has jurisdiction to fix the custody where a divorce is denied in a subsequent proceeding by *habeas corpus*, and that it seems to him useless to deny the relief in a divorce suit and grant it in another suit for the same purpose in States where the different forms of action are abolished. That opinion, of course, has no application to the courts of this State, where the law-making power has not thought it wise to abolish all distinctions between *habeas corpus* and bills for divorce nor to authorize courts of equity to administer purely legal remedies. In *Power v. Power*, 65 N. J. Eq. 93, it was held that when a wife has been denied a divorce the court may award the custody of the children if the bill contains a prayer for such relief, but it is quite clear that the court cannot grant such relief under a statute which limits the power of the court to cases where a divorce is granted. The courts generally hold that where a divorce is denied or not granted the court cannot consider or pass upon the question of the custody of the children. (*Simon v. Simon*, 6 N. Y. (App. Div.) 469, affirmed on the opinion below, 159 N. Y. 549; *Keppel v. Keppel*, 92 Ga. 506; *Garrett v. Garrett*, 114 Iowa, 439.) Mr. Thomas could not have maintained his cross-bill by virtue of any provision of the Divorce act, and if he could not have maintained it under the general equity powers of the court, it was error to refuse leave to dismiss the original bill because the cross-bill had been filed, and the final decree was also erroneous.

A cross-bill which is filed merely as a mode of defense to bring into the case matters occurring after the cause is at issue requires no equity to support it, but a cross-bill which asks affirmative relief is in the nature of an original bill asking further aid of the court beyond the mere defense, and the relief sought must be such as the court, in point of jurisdiction, is competent to administer. (*Tobey v. Foreman*, 79 Ill. 489; *Morrison v. Morrison*, 140 id.

560.) While such a bill must be germane to the subject matter of the original bill, it is, in fact, a separate and distinct suit commenced by the filing of the cross-bill. (*Bal-lance v. Underhill*, 3 Scam. 453.) It is an auxiliary suit concerning the same matters involved in the original bill, which is permitted in order that complete justice may be done between the parties in one proceeding. After a court of equity has obtained jurisdiction upon any equitable ground, it will retain such jurisdiction for the purpose of avoiding more than one suit and doing justice between the parties, although in doing so it may be necessary to establish purely legal rights or to grant legal remedies; (*Long-shore v. Longshore*, 200 Ill. 470;) but in order to authorize relief which can be obtained in a suit at law there must be some substantial ground of equitable jurisdiction, and if there is no equitable ground of jurisdiction and the remedy sought can be as well obtained in an action at law, the court cannot retain jurisdiction and grant a purely legal remedy. *Brauer v. Laughlin*, 235 Ill. 265.

Mrs. Thomas refused to prosecute her suit for divorce, which she had a right to control, and asked the court to dismiss her bill, which the court could only refuse to do because the cross-bill had been filed. As already shown, the court could not refuse to dismiss the original bill, under the provisions of the divorce statute, because a cross-bill had been filed which was unnecessary and asked for relief which could not be granted unless the original bill was prosecuted to a decree for divorce. The court proceeded to hear the cause upon the cross-bill, which asked for affirmative relief, by granting to the complainant therein the custody of the children; and if a husband cannot maintain a suit in equity against his wife for such a purpose the court was without jurisdiction and the decree was erroneous.

No case where such a bill has ever been filed in Eng-land or this country has been discovered by the careful

research of the able counsel who have argued this case, and while the fact that it has never been done is not conclusive that it cannot be, it is satisfactory evidence that no solicitor has thought that it could be done. The argument in favor of such jurisdiction is upon the ground that courts of equity have a broad and comprehensive jurisdiction over the persons and property of infants. The existence of such jurisdiction has been frequently asserted in the strongest language, but such declarations are not different from like statements made with reference to jurisdiction over trustees and others occupying fiduciary relations. The jurisdiction can only be exercised when it has been acquired as to the particular person and subject matter in accordance with the practice in courts of equity, which is by the commencement of some sort of recognized proceeding in the court. What has been so often said respecting the jurisdiction does not mean that courts of equity take upon themselves the care, custody, education and maintenance of all the children within the territorial limits where they exercise their powers, but when a suit is instituted in a court of equity relative to the person or property of an infant he is treated as a ward of the court, and the court will not allow his rights to be prejudiced by any act, either of his own or of any other person. The court will protect the infant through a guardian *ad litem* or otherwise, as may be necessary, and will look to his interests and see that the guardian discharges his duty. (*Lynch v. Rotan*, 39 Ill. 14; *Hartmann v. Hartmann*, 59 id. 103; *Allman v. Taylor*, 101 id. 185; *Ames v. Ames*, 148 id. 321.) Where some proceeding is instituted in which an infant is a party, either as plaintiff or defendant, the controversy and decision of the court relate to his rights and property, and the court will see that he is represented by guardian, next friend, or in some proper manner, who is entitled to assign error on an improper decision of the court, and in such a proceeding

the infant becomes a ward of the court. In *Greenman v. Harvey*, 53 Ill. 386, it was said that an infant who was a party defendant did not become the ward of the court until service of process upon her. The jurisdiction so exercised respecting the rights or property of infants is a part of the general equity jurisdiction, but this case is not within those limits. The cross-bill was filed by a husband against his wife to enforce an alleged right of the husband to the custody of the children. The attempt was to have the court consider and determine the relative rights of the parents to such custody, which is not an equitable but a legal right. It is true that where the court has jurisdiction the legal right will not be enforced to the detriment of the child, and the guiding motive of the court will be to conserve and protect the best interests of the child. But the right in question is that of a parent. Neither a want of harmony between a husband and wife relating to the management of their children, nor the right of either to their custody, control, support or education, involves any equitable title or question of an equitable nature. The principles upon which equitable powers are exercised do not sustain the claim that a husband and wife may litigate with each other in a court of equity over the question which one shall have the custody of their children.

There is another power which courts of equity have concerning infants and their property, and that is the appointment of guardians. (*Hohenadel v. Steele*, 237 Ill. 229.) The source of this jurisdiction is quite uncertain. Whether the power was originally a mere usurpation, or was legally delegated to the chancellor by the crown as *parens patriæ*, or grew out of the practice of appointing guardians *ad litem*, the jurisdiction exists here by inheritance from the English courts of chancery and not because equitable rights or titles are involved. Like the power of any other court to appoint a guardian, that jurisdiction may be exercised upon a proper petition or application for the

appointment of a guardian. But the cross-bill in this case cannot be regarded as such a petition or application. In *Cowles v. Cowles*, 3 Gilm. 435, where the parties had been divorced, the court said that the legislature, in providing that when a divorce is decreed the court may award the custody of the children, conferred no new power on the court, which was correct in the sense that the power is of the same nature as a pre-existing power; but the court did not intimate that the power had ever been or could be exercised in a litigation between a husband and wife relating only to the custody of the children.

We conclude that the court had no jurisdiction to award the custody of the children to Mr. Thomas, and that the Appellate Court erred in affirming the decree of the superior court.

The judgment of the Appellate Court and the decree of the superior court are reversed and the cause is remanded to the superior court, with directions to dismiss the original bill and cross-bill.

Reversed and remanded, with directions.

Mr. JUSTICE CARTER, dissenting:

I do not concur in the reasoning or conclusion of the foregoing opinion. Our statute provides that the court in which divorce proceedings are instituted may make orders, pending such proceedings, as to the custody of the children, and if a decree of divorce is granted, make such further orders as to their care and custody, from time to time, as their interests may require. In *Cowles v. Cowles*, 3 Gilm. 435, this court long ago said (p. 438): "It becomes clear, then, that our legislature, by providing that 'when a divorce shall be decreed it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just,' has

conferred no new authority or jurisdiction upon the court. It was by its original jurisdiction clothed with the same powers before. The cases provided for in this statute are necessarily embraced in that broad and comprehensive jurisdiction with which the court of chancery is vested, over the persons and estates of infants and their parents who are bound for their maintenance." It is the well settled law in this jurisdiction that a court of chancery is vested with "broad and comprehensive jurisdiction" over the persons and estates of all minors within the limits of its jurisdiction. *Hartmann v. Hartmann*, 59 Ill. 103; *Wilkinson v. Deming*, 80 id. 342; *Dodge v. Cole*, 97 id. 338; *In re Ferrier*, 103 id. 367; *Ames v. Ames*, 148 id. 321; *Van-Matre v. Sankey*, 148 id. 536; 3 Pomeroy's Eq. sec. 1303.

It is insisted that the cross-bill is not germane to the matters raised by the original bill. The custody of the minor children was necessarily comprehended within the scope of the original bill, although they were not mentioned therein. (*Snover v. Snover*, 10 N. J. Eq. 261.) Under our statute it would seem that upon the filing of the bill herein the minor children of the marriage became, in a sense, wards of the court, and hence any suggestions as to their custody, in a cross-bill, would be germane and relevant. If it becomes necessary to grant affirmative relief in order to dispose of the matters in controversy and do complete justice between the parties, a cross-bill may be filed, in which such relief may be granted and circuity of action avoided. (*Longshore v. Longshore*, 200 Ill. 470.) It is a familiar rule that when a court of equity acquires jurisdiction for one purpose it will retain it for all purposes, in order to do full and complete justice between all the parties. (*Wchrhein v. Smith*, 226 Ill. 346; *King v. King*, 215 id. 100.) Equity abhors a multiplicity of suits. (*Morrison v. Morrison*, 140 Ill. 560.) Suits for divorce based upon purely statutory grounds are of an equitable nature, and subject to the rules and maxims of courts of equity

rather than those of the English ecclesiastical courts. The fact that the legislature gave the power, in such cases, to the chancery courts of this State rather than to courts of law supports this view. "The equitable nature of the suit being established and it being brought in a court of equity, it should be dealt with upon the same equitable principles as other suits founded upon ordinary equities." (*Rooney v. Rooney*, 54 N. J. Eq. 231.) It is not necessary for children to be brought personally into court in order to give jurisdiction over them in these proceedings. (*Power v. Power*, 65 N. J. Eq. 93.) The court in the case last cited held that the writ of *habeas corpus* was entirely out of place when divorce proceedings are started in order to decide as to the custody of minor children and that the cross-petition upon that question was germane in divorce proceedings, the chancellor saying (p. 101): "I think, under the practice of New Jersey adopted in these cases, that it was perfectly germane to the petition of the wife for the husband to set up this kind of a petition, so as to get affirmative relief against her negative relief. Without that he would only have got negative relief, but with that cross-petition he is entitled to affirmative relief. It is germane to the suit,—just as germane as a cross-petition for divorce would be."

The precise question here raised has never been passed on by this court. It is plain from the majority opinion that there are authorities that uphold its conclusion. Under the varying statutes and systems of procedure the courts have not all agreed on this question. But where, as in this State, the court having jurisdiction of divorces has also general chancery jurisdiction, in my judgment it would be not only for the best interests of the minor children, but in accord with sound public policy, for the court to retain jurisdiction in this proceeding for the purpose of making any orders as to the welfare of the children that justice may require. Unless prohibited by statute or well settled

principles of law, a court of equity has always the power to do that which justice in a case requires. The chancellor in the superior court does not cease to be such because he sits to hear divorce cases. The statute regulating these proceedings does not purport to define fully the authority of the court. It commits thereto, subject to certain specific limitations, jurisdiction in all matters incidental to divorce. This statute is highly remedial and ought not to be strictly construed against the interests of the minors. A learned author has stated that while it may be necessary, in order to give a court of equity jurisdiction over infants, to have them made wards of the court, a suit was not necessary to that end; that any proceeding in or application to a court of chancery relating directly to the infant was sufficient. (3 Pomeroy's Eq. sec. 1305, note 1.) While the divorce proceedings were pending in the superior court, no other court, by *habeas corpus* or otherwise, could interfere with its custody of the children. (*In re Morgan*, 117 Mo. 249.) Certainly the chancery court had jurisdiction in respect to the subject matter of its decree. The only doubtful question is whether it obtained such jurisdiction regularly. There being no settled practice in this State to the contrary, it appears to me most unwise to turn the parties out of court and invite them to come again into the same court for the same relief now sought. The parties being before a court of equity, what more proper time can there be to adjudicate the rights of the parents to the custody of the children? (2 Nelson on Divorce and Separation, p. 979.) The court having acquired jurisdiction of the subject matter and the parties to the suit at the instance and by the prayer of plaintiff in error, I cannot reach any other conclusion than that, on the plainest principles of equity, she should be precluded from questioning the jurisdiction of the court which she herself has invoked.

H. C. FERRIMAN, Appellant, vs. E. N. GILLESPIE, Trustee,
et al. Appellees.

Opinion filed June 20, 1911.

1. RES JUDICATA—*when defense of former adjudication may be raised by demurrer.* Where a bill sets out the substance of the pleadings in a former suit between the parties and the findings therein and prays for a decree contrary to the decree in the former suit, the defense of former adjudication may be raised by demurrer.

2. SAME—*the doctrine extends to matters which might properly have been raised.* Where the question of the existence of homestead rights in land upon which an oil and gas lease is given could have been raised in the former litigation between the parties to cancel such lease, the fact that it was not properly raised in such litigation does not prevent the decree upholding the lease from being *res judicata* of the question of the existence of the homestead rights in a subsequent suit between the parties.

3. SAME—*persons are bound by litigation which is conclusive upon parties with whom they are in privity.* One who takes an oil lease from the owner of land knowing that a prior lease on the same land has been held by the courts to be valid and in force is bound by such adjudication to the same extent as his lessor and cannot litigate the validity of such prior lease with the lessees.

APPEAL from the Circuit Court of Crawford county;
the Hon. E. E. NEWLIN, Judge, presiding.

JOHN LYNCH, for appellant.

CALLAHAN, JONES & LOWE, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

Appellant filed his bill to the September term, 1910, of the circuit court of Crawford county, alleging the former ownership by Sanford C. Bowman of fifty acres of land in said county; that on May 17, 1905, said Bowman and his wife occupied the same as a homestead, the land then

being worth less than \$1000; that on said date Bowman leased said land to one Pierce for five years, or longer if gas or oil was found in paying quantities; that said lease was assigned by Pierce to E. N. Gillespie; that said lease did not contain any waiver of homestead rights by Bowman and was not signed nor acknowledged by his wife; that on March 26, 1910, Bowman and wife executed and delivered to appellant a lease of the said premises for the production of oil and gas, in which lease their homestead rights were waived; that on or about September 1, 1910, the Fulton Oil and Gas Company and Walter Hennig claimed some title in said premises for the purpose of mining for oil and gas, by virtue of two leases executed to one T. N. Rogers and assigned by him, and entered upon said premises and drilled wells for oil and gas and removed and sold the product. A demurrer was filed and on hearing was sustained and the bill dismissed at appellant's costs. From this order and decree an appeal was allowed to this court.

The chief object of the present proceeding, as shown by the prayer of the bill, is to have the Pierce-Gillespie lease set aside so far as it related to the homestead interest of Mr. and Mrs. Bowman; that if the court should find that the premises were worth \$1000 or less at the time the lease was made the lease be held void as to the whole of the premises, otherwise that it be declared void as to the portion representing the \$1000, and the court appoint commissioners to set aside the homestead, and that appellant, as grantee of the Bowmans' rights, be placed in possession of such portion.

The bill sets out the facts as to the litigation between Gillespie and the Fulton Oil and Gas Company, the details of which, and the conclusions of this court thereon, are found in *Gillespie v. Fulton Oil and Gas Co.* 236 Ill. 188; 239 id. 326; 244 id. 9. It sets forth the substance of the

pleadings in these former suits and the findings therein, and prays for a decree inconsistent with the decree in that litigation. It also states the result of that litigation and the holding that the Gillespie lease was valid, and prays that it may be declared null and void. The defense of former adjudication may therefore be raised by demurrer. (*Hofmann v. Burris*, 210 Ill. 587; *Davis v. Hall*, 4 Jones' Eq. 403; 9 Ency. of Pl. & Pr. 616.) Neither Bowman nor his wife, under the findings in *Gillespie v. Fulton Oil and Gas Co. supra*, could raise in other litigation any question as to their homestead rights under the Gillespie lease. While it is true the homestead question here raised was not properly raised in the former litigation, it could have been so raised, as Bowman was a party. The doctrine of *res judicata* extends not only to every matter that was determined in the former suit, but to every other matter that might have been raised and determined. (*South Park Comrs. v. Ward & Co.* 248 Ill. 299; *Singer v. Hutchinson*, 183 id. 606; *Daniel v. Gum*, 45 S. W. Rep. [Tenn.] 468.) The lease was executed by appellant after the former litigation with Bowman as to the Gillespie lease had been heard in this court. Appellant had notice of that fact. This litigation being binding on Bowman is binding on his grantee. He succeeded to the same estate or interest which Bowman had. (*Towle v. Quante*, 246 Ill. 568, and cases cited; *City of Chicago v. Drexel*, 141 id. 89.) All parties and their privies are bound by a former adjudication. Privies are estopped from litigating that which is conclusive upon him with whom they are in privity.

The decree of the circuit court must be affirmed.

Decree affirmed.

W. H. HOPKINS, Defendant in Error, vs. W. G. LEVANDOWSKI, Plaintiff in Error.

Opinion filed June 20, 1911.

1. LANDLORD AND TENANT—*recognition of tenancy after time for forfeiture is a waiver.* If the landlord by some act recognizes the tenancy as existing subsequent to the time he might have declared a forfeiture under the lease, the forfeiture is thereby waived.

2. SAME—*effect of giving notice after tenant is in default for not paying the rent.* A provision in a lease declaring a forfeiture if the rent is not paid when due renders the lease voidable upon that ground at the election of the landlord, but if, after the rent is due, he gives notice to the tenant to surrender possession in five days the right to declare a forfeiture is waived for that period, and he cannot lawfully bring an action of forcible detainer before the expiration of the time stated in the notice.

3. COURTS—*power of municipal court of Chicago to make rules.* Under the provisions of the Municipal Court act the municipal court of Chicago has the power to make rules for conducting and disposing of cases within the jurisdiction of the court for which methods of procedure have not been prescribed by said act.

4. CONSTITUTIONAL LAW—*provisions of Municipal Court act concerning forcible entry and detainer not invalid.* The provisions of the Municipal Court act concerning forcible entry and detainer suits are not unconstitutional in leaving the matter of issuing writs of restitution to be regulated by the rules of the municipal court instead of authorizing such writs in express terms.

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding.

LOUIS GREENBERG, CLARENCE E. MERCER, and THOS. H. MERCER, for plaintiff in error.

McKENZIE CLELAND, for defendant in error.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

An action of forcible detainer was brought by defendant in error in the municipal court of Chicago against the plaintiff in error December 3, 1910, and on the trial the

court instructed the jury to find for defendant in error and judgment was entered on the verdict. This writ of error was sued out to reverse that judgment, and the case is brought to this court on the ground that a constitutional question is involved as to the power of the municipal court to make rules.

Plaintiff in error contends that the provisions of the Municipal Court act as to proceedings in forcible entry and detainer suits subsequent to the trial delegate legislative powers to the municipal court of Chicago and are therefore unconstitutional. Section 48 of the Municipal Court act provides that the practice in forcible entry and detainer suits, other than the mode of trial and the proceedings subsequent to trial, shall be the same, as near as may be, to that prescribed by law for similar cases in other courts of record, but that "the mode of trial and all proceedings subsequent to the trial shall be the same, as near as may be, as in other cases of the fourth class, mentioned in section 2 of this act." Cases of the fourth class in the municipal court are tried without written pleadings. Nothing is said in the Municipal Court act as to the issuing of a writ of restitution in forcible entry and detainer suits. Under the provisions of said Municipal Court act the municipal court may make rules for conducting and disposing of cases within the jurisdiction of that court for which methods of procedure have not been sufficiently prescribed by the said act. The municipal court, under these provisions, has made rules with reference to issuing writs of restitution in forcible entry and detainer suits. Section 34 of article 4 of the constitution, under which the municipal court was created, states that the practice in that court "shall be such as the General Assembly shall prescribe."

Counsel for plaintiff in error argue that the legislature cannot delegate to the municipal court the power to regulate the issuing of writs of restitution in forcible entry and detainer suits. In the recent case of *People v. Roth*, 249

Ill. 532, this court held that it was not a violation of the provision of the constitution vesting legislative power in the General Assembly, to authorize boards created by the legislature to formulate rules for the performance of their duties. In *Coleman v. Newby*, 7 Kan. 82, it is stated that the legislature may enact general provisions authorizing the courts who are to act thereunder to fill up the details. "They may mark out the outlines and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations." In *Wayman v. Southard*, 10 Wheat. 1, the Supreme Court of the United States, speaking through Chief Justice Marshall, said: "The jurisdiction of a court is not exhausted by the rendition of its judgment but continues until the judgment shall be satisfied. * * * Were it even true that jurisdiction could be technically said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done and would consequently be necessary to the beneficial exercise of jurisdiction." Nothing is said in any of the authorities cited by counsel for plaintiff in error that in any way conflicts with the conclusions reached in the foregoing decisions. The sections of the Municipal Court act are not unconstitutional because they fail to state in specific terms the requirements as to the issuing of writs of restitution in forcible entry and detainer suits.

Plaintiff in error occupied a store room in a building known as 4548 Cottage Grove avenue, Chicago, and the second floor flat of a building in the rear of said store, under two leases executed in 1910 and both expiring April 30, 1913. The original lessor for the flat was the defendant in error and for the store one Bovee, who afterwards, on April 12, 1910, assigned the lease to the defendant in error. The rental was payable in monthly installments of \$35 on the store and \$15 for the flat. The record shows that the default is as to the rent for December, 1910; that on De-

ember 1 plaintiff in error went to Hopkins' residence and told his wife that he came to pay the rent; that she said she had no receipt and the rent would be collected by the man who had collected it the previous month, and that she refused to accept it. The testimony of plaintiff in error as to his offer to pay the rent to Mrs. Hopkins is not contradicted and no question is made whether Mrs. Hopkins was the proper person to receive it, hence whether plaintiff in error offered to pay the rent on December 1 was a question for the jury to determine. *VanVlissingen v. Lenz*, 171 Ill. 162.

The plaintiff in error also offered in evidence a five days' notice concerning the rent due December, 1910, which stated that unless payment was made on or before December 7 the lease would be terminated. He testified that this notice was served on him December 2, 1910, the day before this suit was started. The court refused to admit this notice in evidence. Plaintiff in error contends that having served such five days' notice the defendant in error thereby waived the right to declare a forfeiture under the lease, at least until the time stated in the notice had expired. Defendant in error, on the contrary, insists that as the leases provided that they could be forfeited at the election of the lessors for non-payment of rent, without notice, the notice in question could not be considered as waiving the forfeiture under the leases. If the landlord has by some act recognized the existence of the tenancy subsequent to the time he might have declared the forfeiture, such right of forfeiture is thereby waived. (*Webster v. Nichols*, 104 Ill. 160; *McKildoe's Exr. v. Darracott*, 13 Gratt. 278; *Jones on Landlord and Tenant*, sec. 496; 1 *Underhill on Landlord and Tenant*,—1909 ed.—sec. 407; *Ward v. Day*, 117 Eng. C. L. 359.) It is not essential that the landlord should actually have in mind the waiving of the forfeiture. (*Kales on Future Interests*, sec. 64.) A notice to quit has been held such a waiver. (*Taylor on Landlord*

all for the Court said that it was not a violation of the Constitution vesting legislative power in the General Assembly, in subordinate boards created by statute to formulate rules for the performance of duties. In *Thompson v. Thompson*, 7 Kan. 82, it is said the legislature may make general provisions and leave it to an inferior body to fill up. "They may mark on the outlines and leave it to an inferior body to use their discretion in carrying out the main regulations." In *Wong v. Board of Education*, 101 Kan. 1, the Supreme Court of this State speaking through Chief Justice Marshall, said that a writ of certiorari is not exhausted by its judgment but continues until the judgment is affirmed. * * * Were it even true that the writ would be technically said to terminate with the affirmation, it would be a writ necessary for which was previously done and would be necessary to the beneficial exercise of the writ. It is said in any of the authorities cited that the writ is issued in error that in any way conflicts with the decision reached in the foregoing decision. Municipal Court act are not unconstitutional. The act fail to state in specific terms the grounds for the issuing of writs of restitution in such suits.

Plaintiff in error occupied a

known as 4548 Cottage Grove avenue, second floor flat of a building in the city of Kansas City, Missouri, under two leases executed in 1913. The original lease was for the term of one year, from April 12, 1910, to April 12, 1911. The rental was \$10.00 per month. The second lease was for the term of one year, from April 12, 1911, to April 12, 1912. The rental was \$10.00 per month. The plaintiff in error occupied the premises under the second lease.

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the Municipal Court of Chicago;
GEMMILL, Judge, presiding.

CAMPBELL, (CHARLES V. CLARK, of
error.

WRIGHT delivered the opinion of the

plaintiff in error, sued the Texas and
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and Tenant,—6th ed.—sec. 498; 2 Platt on Law of Leases, sec. 469; *Doe v. Miller*, 2 C. & P. 348.) The reasoning in *Gradle v. Warner*, 140 Ill. 123, and *McConnell v. Pierce*, 210 id. 627, tends to support the same conclusion. The provision declaring a forfeiture for non-payment of rent only made the lease voidable at the election of the lessor. On reason and authority, therefore, if the defendant in error gave a five days' notice he thereby recognized the tenancy of plaintiff in error and waived his right to forfeiture until the expiration of the time stated in the notice. The trial court should have admitted the notice in evidence.

The conclusions we have reached render it unnecessary to consider or decide the other errors assigned.

The judgment of the municipal court must be reversed and the cause remanded to that court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

JOHN T. BOOZ, Defendant in Error, *vs.* THE TEXAS AND
PACIFIC RAILWAY COMPANY, Plaintiff in Error.

Opinion filed June 20, 1911.

1. JURISDICTION—*a judgment rendered without jurisdiction is not due process of law.* The question of the jurisdiction of a court to render a judgment is one of due process of law, and if the defendant was not amenable to service of process within the State, a judgment rendered against him is not in pursuance of the due process of law guaranteed by the constitution.

2. SAME—*section 8 of the Practice act is not confined to the service of process on domestic corporations.* Section 8 of the Practice act, which provides the method of service of process on corporations by leaving a copy with any clerk or agent, is not confined to domestic corporations, and if a foreign corporation is transacting its corporate business in this State and has an agent here, process may be served upon it the same as upon a domestic corporation.

3. SAME—*foreign corporation must have entered domestic State to carry on its business.* If a foreign corporation avails itself of

the privilege of doing business in a State whose laws authorize it to be sued there by obtaining service on an agent, the assent of the corporation to such service will be implied; but the corporation must have entered the State for the purpose of carrying on its business there.

4. SAME—*what is "doing business" within the State.* Doing business within this State means the transaction of the ordinary business in which the corporation is engaged, by the exercise of some of its charter powers.

5. SAME—*mere solicitor of business is not an agent upon whom process may be served.* A person employed merely to solicit freight and passenger business for a foreign corporation, and having no power to sell any ticket, issue a bill of lading or make any contract for the corporation, which merely joined with other corporations in paying his salary and office rent, is not an agent upon whom process against the corporation may be served.

6. SAME—*when a foreign corporation cannot be served with process in Illinois.* A foreign corporation cannot be served with process in Illinois by leaving a copy with an agent unless the corporation is doing business in this State and has an agent here who has power to represent the corporation in the transaction of some part of the business contemplated by its charter.

7. SAME—*officer's return is not conclusive that person served is the agent of the foreign corporation.* The officer's return that the summons was served upon a foreign corporation by leaving a copy with a certain person as agent is not conclusive upon the corporation that such person is its agent, and it is entitled, under a limited appearance, to dispute the truth of the return.

WRIT OF ERROR to the Municipal Court of Chicago;
the Hon. WILLIAM N. GEMMILL, Judge, presiding.

JEFFERY, OTT & CAMPBELL, (CHARLES V. CLARK, of
counsel,) for plaintiff in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

John T. Booz, defendant in error, sued the Texas and Pacific Railway Company, plaintiff in error, for the value of an overcoat alleged to have been lost by him on February 25, 1909, through negligence of plaintiff in error while

he was a passenger on one of its trains between two stations in Louisiana. Summons was returned by a bailiff served on George W. Pither, chief clerk and agent of defendant. A limited appearance was entered by attorneys for defendant for the sole purpose of questioning the jurisdiction of the court, and a motion was made to quash and set aside the return. The facts upon which the motion was decided are as follows:

The defendant is a railroad corporation existing under the laws of the United States and the State of Texas, with its principal office in Dallas, Texas. Its lines of road are in Texas and Louisiana, and it has never owned, leased or operated any road nor had any principal office in this State and the cause of action did not arise in this State. George W. Pither is an employee of W. C. Staley, a soliciting freight agent, and Ellis Farnsworth, a soliciting passenger agent of several foreign railroad companies, including the defendant. The defendant and four other railroad companies operating railroads outside of this State in the same region jointly maintain three offices in the city of Chicago and jointly pay the office expenses and salaries of the employees, the defendant paying its share of the rental and salaries. All the employees and the business are under the control of Edward B. Boyd, who is not an officer of any of the corporations but is hired by the railroads jointly and is called an assistant to the vice-president. The only business transacted through this office or by the employees is soliciting shipments by way of the lines of these corporations from large manufacturing and industrial concerns, and endeavoring to persuade prospective shippers or consignees of freight to route shipments over the lines of said corporations, and soliciting passenger business by persuading passengers to purchase their tickets so they will pass over some one or more of the lines of said corporations, all of which are outside of this State. That is and has been the only business transacted in this State for the defend-

ant, and neither Boyd nor any of the employees under him have any power to make a contract for the defendant, to issue any bill of lading, sell any ticket, receive any money or make any freight or passenger contract. Boyd and his subordinates devote only a portion of their time to the services of the defendant, and the sole duties performed by them are the solicitation of freight and passenger business.

The court overruled the motion to quash the return, and the defendant elected to stand by its motion and declined to enter another or further appearance. The court thereupon heard the evidence for the plaintiff, found the issues in his favor, assessed his damages at \$50 and entered judgment for that amount. The defendant excepted to the judgment and sued out a writ of error from this court to obtain a review of the record. By the assignment of errors it is alleged that the judgment violated the constitution of this State and the United States by depriving the defendant of its property without due process of law.

A question of the jurisdiction of a court to render a judgment is one of due process of law, and if the defendant was not amenable to service of process within this State the judgment was not rendered in pursuance of the due process of law guaranteed by our constitution. Section 8 of the Practice act provides the method for acquiring jurisdiction of a corporation, which may be done by leaving a copy with any clerk or agent of the corporation, if the president cannot be found within the county. The section is not confined, in its terms, to domestic corporations, and if a foreign corporation is present within this State and has an agent here, process may be served upon it. A business corporation is constructively present in any State where it has property and carries on its operations by means of agents, although the domicile of the corporation is in another State. (*Edwards v. Schillinger*, 245 Ill. 231.) If a foreign corporation does business in the State through agents, it may be sued there by obtaining service on the

agent. (*Barrows Steamship Co. v. Kane*, 170 U. S. 100; *Western Union Telegraph Co. v. Pleasants*, 46 Ala. 641.) If it avails itself of the privilege of doing business in a State whose laws authorize it to be sued there by service of process upon an agent, its assent to such service will be implied, (13 Am. & Eng. Ency. of Law,—2d ed.—895,) but the foreign corporation must have entered the domestic State for the purpose of carrying on its business there. (19 Cyc. 1328.) In *Mineral Point Railroad Co. v. Keep*, 22 Ill. 9, a Wisconsin corporation had built and operated a railroad from the line between Wisconsin and this State to Warren, in Jo Daviess county, and it was held the foreign corporation having property in this State and doing business here could be served with process by delivering a copy to its conductor, the president not being within the State. In *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, a foreign corporation had extended its business into this State and transacted such business here through an agent, who occupied an office maintained by the corporation and who was advertised on the office door as its western agent, and the corporation had written letters to its customers referring them to the agent for the adjustment of its business affairs. It was held not improper to instruct the jury that a corporation so acting was bound, as principal, to those dealing with such person, whether the agency in fact existed or not. It was not implied, however, that any representative capacity would be sufficient to constitute a representative an agent, and attention was called to the fact that in other instructions the court advised the jury that a salesman who sells goods for a corporation on commission and stands in no other relation to the corporation is not an agent as contemplated by the statute, and that service of process on such a salesman would not confer jurisdiction on the corporation. Doing business within this State means the transaction of the ordinary business in which the corporation is engaged, by the exercise of some of its charter

powers. (*Alpena Cement Co. v. Jenkins & Reynolds Co.* 244 Ill. 354.) In *Midland Pacific Railway Co. v. McDermid*, 91 Ill. 170, the defendant was a corporation of the State of Nebraska, and the summons was served on its general superintendent temporarily in this State and passing through it, and the defendant did not do any business nor have any property in this State. The service was within the literal language of the Practice act, but it was held that there being no local agent in this State there was no one upon whom service of process could be lawfully had.

The return of the bailiff was not conclusive of the fact that George W. Pither was the agent of the defendant, and defendant was at liberty to dispute the truth of the return. The conclusion as to that fact depended upon whether the defendant had extended its business into this State so as to be constructively present here and was transacting that business through George W. Pither, as its agent. The defendant, being a foreign corporation, could only be served in this State if it was doing business here, and no one could be an agent of the defendant unless he had power to represent it in the transaction of some part of the business contemplated by its charter. There was no one in this State who had power to make any contract or bind the defendant in any way, and the mere solicitation of business by persons who have no other authority is not doing business within this State. Neither Boyd nor any one under him had authority to sell a ticket, issue a bill of lading or make a contract for the defendant, and they were no more agents of the defendant than other railroad companies selling tickets or issuing bills of lading under which the passengers or freight would pass over the road of the defendant in Texas or Louisiana. The decisions of the courts are that mere solicitors of business are not agents, within the meaning of the statute. *Wall v. Chesapeake and Ohio Railway Co.* 95 Fed. Rep. 398; *Fairbank Co. v. C., N. O. & T. P. Ry. Co.* 54 id. 420; *Green v. Chicago, Burlington and Quincy*

Railroad Co. 205 U. S. 530; *North Wisconsin Cattle Co. v. Oregon Short Line Railroad Co.* 117 N. W. Rep. 391.

The court erred in refusing to quash the return, and the subsequent proceedings were void for want of jurisdiction over the defendant. The judgment is reversed.

Judgment reversed.

BELLE LESHER, Plaintiff in Error, vs. JACOB H. LESHER,
Defendant in Error.

Opinion filed June 20, 1911.

1. COURTS—*courts will not occupy themselves with moot cases.* Courts of review, like courts of original jurisdiction, exist for the determination of actual controversies and for the establishment of rights requiring adjudication, and will not occupy themselves with moot cases or those not for establishing controverted rights.

2. APPEALS AND ERRORS—*confession of errors requires reversal of judgment.* Where the defendant in error confesses the errors assigned the parties are entitled to the judgment of the court of review on such pleadings, and the court of review can do nothing but enter a judgment reversing the judgment or decree and remanding the cause.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

ALBERT H. FRY, and RUSSELL M. WING, for plaintiff in error.

WILLIAM B. MCILVAINE, *amicus curiæ*, (WILSON, MOORE & MCILVAINE, of counsel.)

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error filed her bill in the circuit court of Cook county alleging her marriage to defendant in error and his desertion of her without any reasonable cause,

and praying for a decree awarding her separate support and maintenance. The defendant in error answered denying the marriage, and after a hearing upon the evidence a decree was rendered finding against the plaintiff in error and dismissing her bill. She prosecuted an appeal to the Appellate Court, where the defendant in error filed a confession of errors and the parties joined in asking for a reversal of the decree. That court, however, denied this motion and upon a consideration of the merits of the case affirmed the decree. The record has been bought before us by *certiorari*, and the plaintiff in error seeks a reversal of the judgment of the Appellate Court.

No brief has been filed on the part of the defendant in error. In the brief of the plaintiff in error the record of the circuit court is considered at length, and it is argued that the decree is contrary to the evidence. We have not gone into that record. Courts of review, like courts of original jurisdiction, exist for the determination of actual controversies and the establishment of rights requiring adjudication. Courts will not occupy themselves with moot cases and cases which do not involve the establishment of a right which may be the subject of controversy between the parties. Here the plaintiff in error alleged the decree to be erroneous and the defendant in error confessed it. The plaintiff in error was entitled to judgment on the pleadings, and the Appellate Court had no other duty to perform than to enter the judgment required by law, reversing the decree and remanding the cause.

The judgment of the Appellate Court and the decree of the circuit court will be reversed and the cause remanded to the circuit court.

Reversed and remanded.

FRANK FOX *et al.* Appellees, *vs.* W. F. FOX *et al.* Appellants.

Opinion filed June 20, 1911.

1. TRUSTS—*a resulting trust does not arise out of contract.* A resulting trust does not arise out of contract but arises by implication of law where the necessary facts exist.

2. SAME—*express trust need not be declared by trustee in any particular form.* It is not necessary that an express trust shall be declared by the trustee in any particular form or that a writing be framed for the purpose of declaring the trust, but such declaration may be found in letters, memoranda or writings of the most informal nature.

3. SAME—*express trust may be declared by answer in chancery signed by trustee.* An express trust may be declared by an answer in chancery signed by the party who in law is entitled to declare it, but the terms of the trust must be gathered from the whole answer as it stands.

4. SAME—*no particular form of words is necessary to create a trust.* No particular form of words is necessary to create a trust, and if the writing states a definite subject and object it is not necessary that every element required to constitute it be expressed in detail, as parol evidence is admissible to make clear the details.

5. SAME—*question whether there is an equitable conversion depends upon terms of trust.* Ordinarily an essential requisite for an equitable conversion is an absolute expression that the land shall be sold, and an equitable conversion does not exist where the terms of the trust do not make it imperative that the land be sold but make its sale dependent upon the agreement of certain parties as to the time and price.

6. SAME—*if duration of trust is doubtful, equity may be asked to terminate it.* If the duration of a trust is doubtful it is proper to call upon a court of equity to terminate it, as a trust will not be continued merely for the benefit of the trustee.

7. SAME—*when beneficiaries are entitled to have a trust terminated.* When the purposes of a trust have been accomplished and the trustee holds the property in simple trust, the beneficiaries having the absolute equitable ownership, the beneficiaries are entitled to have the trust terminated; and the same rule applies if it becomes impossible to carry out the trust.

8. SAME—*a trustee is not entitled to compensation unless there is some provision for it.* A trustee is not entitled to compensation for personal attention or loss of time, in the absence of some pro-

vision of the statute or in the instrument creating the trust authorizing such compensation.

9. SAME—*when trustee is not entitled to an allowance for attorney's fees.* A trustee is not entitled to an allowance for an amount paid by her to an attorney for services, where it appears such attorney was one of the beneficiaries and that he had agreed to furnish his services without compensation.

10. PARTITION—*when bill for partition and accounting will lie.* A bill against a trustee for an accounting and for partition of the land among the beneficiaries will lie where the beneficiaries have the absolute equitable title to the land as tenants in common and the purposes of the trust have been accomplished.

11. FIDUCIARY RELATIONS—*when assignment to former attorney is properly set aside.* A beneficiary who has acted as the attorney in the affairs of a trust estate owes to another beneficiary from whom he is about to purchase her interest the duty of disclosing to her his knowledge as to the value of such interest, and the assignment should be set aside if he fails to prove perfect good faith upon his part and that he paid a fair price for such interest.

APPEAL from the Circuit Court of Clay county; the Hon. A. M. ROSE, Judge, presiding.

JOHN LYNCH, EUGENE L. MARTIN, and W. F. FOX, for appellants.

JAMES H. SMITH, and R. W. NELSON, (T. S. WILLIAMS, guardian *ad litem*,) for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is a bill filed by appellees in the circuit court of Clay county, to the September term, 1909, asking for an accounting from the appellant Mary A. Fox, trustee, for the setting aside of a certain deed, and that the lands in the name of the trustee be vested in the owners and partitioned or sold. After the taking of testimony and a report by the master in chancery a decree was entered in substantial conformity with the prayer of the bill. From that decree this appeal has been prayed.

Patrick Fox died intestate on June 19, 1887. He was unmarried and left no children or descendants. His only heirs-at-law were Michael W. Fox and Frank Fox, his brothers; Bridget Kelly and Mary Fox, his sisters; and eight children of a deceased brother, Bernard Fox. He left land in Clay and Gallatin counties, Illinois, aggregating in all about one thousand acres. In 1894 these heirs commenced a partition suit in the circuit court of Clay county, which was prosecuted to a decree of sale, and pursuant to the decree the master advertised the lands for sale. Frank Fox, representing himself and his brother and sisters, and W. F. Fox, (who was the son of the deceased brother, Bernard Fox,) representing his brothers and sisters, some of whom were then minors, concluded that if the land was sold to strangers at this sale it was liable to be sacrificed. They agreed that W. F. Fox should attend the sale and bid in the property, if necessary. Accordingly he attended the sale, and as the land did not go to a satisfactory price he bid it in in the name of his sister, Mary A. Fox, as trustee. The master's deed was issued to Mary A. Fox, trustee, but did not name the beneficiaries nor designate the power of the trustee nor the duration of the trust. Pending the hearing of the partition suit, in 1894, Anna J. Fox, a sister of appellant W. F. Fox, by her attorney in fact, W. F. Fox, conveyed her undivided one-fortieth interest in the lands in question to her uncle, Frank Fox, it being understood that he should hold this interest in trust for her benefit. The decree in the original partition suit, in 1894, vested this undivided interest in Frank Fox absolutely. It decreed that he owned the undivided nine-fortieths interest in the said land, Mary Fox owned one-fifth, Bridget Kelly one-fifth, Michael W. Fox one-fifth and the children of Bernard Fox (except Anna J.) each an undivided one-fortieth interest in said premises. It is claimed by appellees (and there is evidence in the record tending to uphold this claim) that appellant W. F. Fox, being the only

lawyer in the family, engineered and advised the sale by the master to his sister as trustee, explaining to his uncle, Frank Fox, that it would be much better to take the title in one person for the purpose of making conveyances of the land, both because some of the beneficiaries were minors and therefore unable at that time to execute deeds, and further because of the fact that Mary Fox, the sister of Frank Fox, was in a convent and did not wish to be annoyed with worldly matters; that they could probably sell the land to better advantage in small tracts; that the agreement was that the trustee should keep the title of the unsold land in her until the youngest child of Bernard Fox became of age, unless all the land was sold prior thereto; that it was further agreed between Frank Fox, representing himself and his brother and sisters, and W. F. Fox, representing himself and his brothers and sisters, that Frank Fox should act as the financial agent of all the parties, negotiate the sale of these lands and should personally supervise and attend to the same; that Mary A. Fox should sign and acknowledge deeds as directed by Frank Fox and W. F. Fox; that W. F. Fox was to act as legal adviser for all parties in interest, and that each should render all necessary services without compensation.

Appellants agree substantially as to all of the matters above set forth with reference to the original partition suit and the sale of the property to Mary A. Fox as trustee, but they disagree as to the terms of the trust. In the answer of Mary A. Fox it is claimed that subsequent to the sale it was agreed between Frank Fox, representing four-fifths of the interests, and W. F. Fox, representing the remaining one-fifth, that the said Mary A. Fox, trustee, should hold the title in trust for the heirs (as their interests appeared at the time of Patrick Fox's death) until such time as a sale of the whole could be made, in tracts or in entirety; that as such sales were made she was to make deeds to the purchasers, and that the price should be that agreed upon

and consented to by both Frank Fox and W. F. Fox; that after paying the expenses incident thereto, Mary A. Fox, trustee, was to divide the net proceeds in accordance with the interests of each heir-at-law, and that the title was to remain in said trustee until all the lands formerly owned by Patrick Fox in Clay county were sold and disposed of.

It is insisted by appellants that this trust must be held to be an express trust and not a resulting trust; that so far as the parties who were of age at the time it was entered into are concerned, it is based on a contract, and the heirs who were then minors have since ratified it. A resulting trust does not arise out of a contract, but is an implication of law from the existence of facts necessary to justify such implication. (*Monson v. Hutchin*, 194 Ill. 431.) This was an express trust as to the adults but was a resulting trust as to those who were minors at the time the deed was taken in the partition suit in the name of Mary A. Fox, trustee. These minors now being of age, insist that it shall be held an express trust, and it will therefore be so treated as to all the parties.

It is further argued by appellants that an express trust cannot be sustained except by writing, and there is no writing by which Mary A. Fox can be bound as trustee, except her answer in this proceeding. It is not necessary that the trust should be declared by the trustee in any particular form or that a writing should have been framed for the purpose of declaring the trust, but such declaration may be found in letters, memoranda or writings of the most informal nature. (*Whetsler v. Sprague*, 224 Ill. 461, and cases cited.) It is well settled that an express trust may be declared by an answer in chancery signed by the party who in law is entitled to declare it. (*White v. Ross*, 160 Ill. 56; *Myers v. Myers*, 167 id. 52.) The terms of the trust must be gathered from the whole answer as it stands. (1 Perry on Trusts,—6th ed.—sec. 85; Lewin on Trusts,—9th ed.—55.) No particular form of words is necessary

to create a trust when the writing makes clear the existence of a trust. (*Orr v. Yates*, 209 Ill. 222.) If it states a definite subject and object, it is not necessary that every element required to constitute it must be so clearly expressed in detail that nothing can be left to inference or implication. Parol evidence is admitted to make clear such details. "If the writing makes clear the existence of a trust the terms may be supplied *aliunde*." *Kingsbury v. Burnside*, 58 Ill. 310; 1 Perry on Trusts, (6th ed.) sec. 82; *Cagney v. O'Brien*, 83 Ill. 72; 28 Am. & Eng. Ency. of Law, (2d ed.) 879, and cases cited.

Conceding that on this record the terms of the trust, so far as they are supplied by the answer of the trustee, must control, it does not necessarily follow, as contended by appellants, that there could be no distribution of the assets or partition of the estate until all the land is sold. We shall refer to this again at greater length. It can be better understood if we first set out the further history of the transactions.

The evidence discloses that Frank Fox paid the entire cost of the partition proceedings in 1894; that the first lands that were sold under the trust agreement were all those in Gallatin county, the total selling price of that property being paid over to the trustee direct; that since then there have been two pieces sold of the Clay county lands, the two sums of money being paid to Frank Fox, and that later another tract of Clay county land was sold, the money being paid directly to the trustee; that from the time of Patrick Fox's death, down to and including the year 1903, Frank Fox from his own funds paid the traveling expenses of himself and W. F. Fox incurred in looking after these lands. Bridget Kelly died in 1901, leaving as her only heir-at-law her daughter, Anna Staggenborg, now Anna Frommel. She left a will, which was set aside by the courts of Kentucky. The one-fifth interest of Bridget Kelly thereupon vested in Anna Frommel. Mary Fox, the

other sister of Patrick Fox, died intestate in February, 1904, and her interest in this property vested in Frank Fox, Michael W. Fox, Anna Frommel and the eight children of Bernard Fox. Frank Fox was appointed administrator of her estate. The youngest of the minor children of Bernard Fox became of age in 1904. Some of the land has been sold and deeds executed by the trustee since that date, apparently with the sanction of all parties. Michael W. Fox was one of the original complainants in this suit but has since died. He left a last will and testament, by the terms of which the appellee Frank Fox was made sole legatee. A supplemental bill setting up these facts has been filed.

After the will of Bridget Kelly was set aside, Anna Frommel, (then Anna Staggenborg,) on September 30, 1904, assigned all of her right, title and interest in the estate of Patrick Fox to appellant W. F. Fox for \$950. It is contended by appellees, and so found by the decree, that the assignment was made upon the representation that it was for the use and benefit of Frank Fox, who was to hold the title thereof for the benefit of the three children of Anna Frommel. The decree set aside this assignment to W. F. Fox and found said interest in Frank Fox, as trustee of said three children of Anna Frommel. The decree found the amounts due and unpaid for the land already sold, from the trustee to the various beneficiaries. It further ordered that the trust in said Mary A. Fox be terminated and that the title held by said trustee be vested in the former *cestuis que trust* as tenants in common; that said Mary A. Fox be divested of all right, title or other claim as such trustee, and that each of the parties be entitled, in fee simple, to the respective shares and interests as follows: Frank Fox, 80-160; Frank Fox, trustee of Alice, Helen and Dorothy Staggenborg, 40-160; Frank Fox, trustee of Anna J. Fox, 4-160; Anna J. Fox, 1-160. and William F. Fox, Mary A. Fox, Bertha G. Fox, John P.

Fox, Bernard C. Fox, May Fox and Joseph E. Fox each 5-160; that a division and partition of the premises be made and commissioners appointed therefor, and that if the premises were not susceptible of division without prejudice the commissioners should report their appraisement.

It is clear from the terms of the trust as set out in the answer of the trustee that no definite time was set when the property should be sold and the trust terminated. It is also apparent from the evidence in this record that appellee Frank Fox and appellant W. F. Fox, who according to said answer were to decide on the price for the property sold, do not agree as to the steps to be taken to terminate the trust. It is contended by the appellants that the trust cannot be terminated until the land is sold, but the chief reason urged by them why it should not now be terminated and closed is, that it is inequitable to charge the costs of this proceeding to them in view of the terms of the trust. There is no claim made that the decree of the court sacrifices the interests of any of the beneficiaries. It is conceded by appellants that it is the duty of every trustee to keep an accurate, full and fair account of all transactions and to have the said accounts ready for inspection and to render them promptly upon reasonable notice, but it is contended that the appellee Frank Fox cannot compel such an accounting as he has never made any accounting to the trustee of the moneys he has received from the sale of lands. The evidence discloses that Frank Fox has paid out more money in caring for the trust estate than he received from the sale of the trust lands. The master found that there was a certain sum of money due him yet from the receipts of the lands already sold, over and above what had been paid him by purchasers and by the trustee.

In this connection it is contended by counsel for appellees that partition proceedings do not lie, because under the terms of this trust there is an equitable conversion of the real estate. The persons found by the decree to be

vested with interests in the unsold land had the equitable title thereto, and under the reasoning of this court in *Bissell v. Peirce*, 184 Ill. 60, *Johnson v. Filson*, 118 id. 219, and *Fitch v. Miller*, 200 id. 170, a bill would lie for partition and accounting.

The question as to whether there was conversion under this trust is to be determined from the terms and conditions of the trust. We do not think those terms, as established in this record, made it imperative to sell the land. Ordinarily, an essential requisite for equitable conversion is an absolute expression that the land should be sold. (3 Pomeroy's Eq. Jur.—3d ed.—sec. 1159.) This sale was dependent upon the agreement of certain parties as to price and time.

As we have seen, the time when this trust should terminate, as set forth in the answer of the trustee, rests upon the uncertain condition of the agreement of the two parties as to the price. It would necessarily end at the death of one of those two parties. If they cannot agree it is not reasonable to construe the trust to mean that it should continue indefinitely. Furthermore, there has been the death of three of the beneficiaries since the trust was created, and all who were minors at that time have become of age. It has been held that where the beneficiaries have become of age or died, the trust will, under certain circumstances, expire. (28 Am. & Eng. Ency. of Law,—2d ed.—949, and cases cited.) If the question of the duration of the trust is doubtful it is proper for a court to be asked to construe the trust on that point. (2 Perry on Trusts,—6th ed.—sec. 920.) A trust will not be continued merely for the benefit of the trustee or in order that he may continue to receive compensation. When the purposes of the trust have been fulfilled and the trustee holds the property on a simple trust, the beneficiaries having the absolute equitable ownership of the fund are entitled to have the trust terminated. The same rule applies if it becomes impos-

sible to carry out the trust. (2 Perry on Trusts,—2d ed.—sec. 920.) From everything shown in this record we think it is clear that for the benefit of all parties this trust should be terminated and the subject matter divided among the beneficiaries. Nothing has been done by any of the beneficiaries that would estop them from asking for the termination of the trust, and there is no claim made that it would be advantageous to any of them to have it continued.

Counsel for appellants further contend that the finding of the decree setting aside the assignment from Anna Staggengborg (Frommel) to W. F. Fox was not justified by the evidence in the record. It appears from the evidence that when this assignment was made W. F. Fox was the only one connected with it that was fully acquainted with the value of that interest, and while Anna Frommel had attorneys representing her who had investigated as to the value of the property, it also appears by the great weight of the evidence that she did not know at this time that her aunt, Mary Fox, had died and that she (Anna Frommel) was entitled to receive a part of her aunt's interest. The evidence also shows that she supposed the property was being sold to her uncle, Frank Fox, that W. F. Fox was acting for him, and that Frank Fox was buying this interest for the benefit of her three children. In view of the fact that W. F. Fox was the only attorney in the family and had been acting for practically all of the heirs up to this time, we think his relations with Anna Frommel were of such a character that it was his duty to give her full and complete information as to all of the facts in connection with her interest. In our judgment the weight of the evidence is to the effect that at the time she sold her interest for \$950 it was worth, as the court found, at least four times that amount. W. F. Fox, as former attorney of the heirs of Patrick Fox, was not entirely incapacitated from purchasing this interest, but the burden of proof on this record

was upon him to show the most perfect good faith on his part and that a fair price was paid for the interest purchased. (*Roby v. Colehour*, 135 Ill. 300; *Beach v. Wilton*, 244 id. 413.) This he did not show and the court rightly set aside the assignment.

Subsequent to the conveyance by Anna Staggenborg to W. F. Fox of all her interest in the estate she executed another deed of all her interest to one McDermott, and the latter then executed a deed of the same property to Frank Fox, as trustee for the three children of Anna Staggenborg. The decree in the trial court set aside the assignment to W. F. Fox and held that the interest of Anna vested in Frank Fox, as trustee for said three children, under the deed from McDermott, and that Frank Fox, as trustee, should re-pay to W. F. Fox the \$950 which the latter had paid to Anna Staggenborg for her interest. In this connection it is urged by counsel for appellants that Frank Fox's interest as trustee for the children of Anna Frommel was obtained by a deed which vested him only with a passive or dry trust, with no active duties to perform, and that it would be at once executed by the Statute of Uses, so that he could not maintain an action in relation to any of the property conveyed. On this record we do not think that W. F. Fox, or any one of the appellants, is in a position to raise this question. Anna Frommel's children are made parties to this proceeding and ask by their guardian *ad litem* that the trust be declared to be in Frank Fox.

The trustee asked the court below for the allowance of \$1000 which she had paid to her brother, the appellant W. F. Fox, who had acted as her attorney since the trust was placed in her hands. In distributing the funds which had been paid out by the trustee, in several of the statements accompanying the check the trustee, through her attorney, W. F. Fox, stated that \$1000 had been paid him as attorney's fees, and no objections appear to have been

made by any of the beneficiaries. We do not think the doctrine of settled accounts applies in this case to attorney's fees. The evidence does not show that any of the beneficiaries settled with the trustee in full and assented to the attorney's fees. There is nothing in the written memoranda that we have in this record concerning the conditions of the trust that refers in any way to compensation to be paid to the trustee or to her attorney. Frank Fox testified that he and the trustee and W. F. Fox were to give all their services gratis, and we do not find any contradiction of this statement in the record. The decree of the court found that W. F. Fox was not entitled to \$1000 attorney's fees that had been paid to him and that the trustee should account for this amount to the beneficiaries. The decisions in this State hold that a trustee is not entitled to compensation for personal trouble and loss of time, in the absence of some provision of the statutes or of the instrument creating the trust allowing him compensation. (*Cook v. Gilmore*, 133 Ill. 139; *Buckingham v. Morrison*, 136 id. 437; *Gray v. Robertson*, 174 id. 242.) This record shows that Frank Fox, who has given a great deal of time to the care of this trust estate, has never charged anything for his time and was not allowed any compensation by the decree. A trustee is entitled to be allowed attorney's fees, under proper circumstances, when it is necessary to protect the trust fund. (*Nevitt v. Woodburn*, 190 Ill. 283.) In view of the testimony that W. F. Fox was to serve as attorney without compensation, we are not disposed to disturb the decree of the chancellor on this point.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE ILLINOIS MATCH COMPANY, Defendant in Error, vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY, Plaintiff in Error.

Opinion filed June 20, 1911.

1. EVIDENCE—*what question improper as calling for conclusion.* It is error to permit a witness to be asked whether the manufacturing company of which he was secretary had ever consented that it should be bound by the conditions expressed in a bill of lading issued to it for a shipment of goods, but it is not ground for reversal, where the witness answers that he had never, and so far as he knew no other representative of the company had ever, so consented.

2. CONTRACTS—*shipping order and bill of lading are to be construed together.* A shipping order entered on a blank prepared by the shipper and delivered to the carrier, and the bill of lading issued by the carrier on receipt of the order, constitute one contract and will be construed together as one instrument in arriving at the intention of the parties.

3. CARRIERS—*the carrier must show that the shipper assented to restriction.* The rule that the carrier must show that the shipper assented to restrictions of liability in the bill of lading applies where the contract consists of two instruments as well as one; but this does not mean that there must be a verbal contract in addition to the written one, but only that the evidence must show the contract was understandingly entered into by the shipper and its limitations assented to.

4. SAME—*what does not estop shipper from denying assent to restrictions in a bill of lading.* The fact that the shipping order made upon the shipper's own blanks, and which is a part of the contract, states that the shipment is to be delivered by the carrier "as per conditions of company's bill of lading," does not estop the shipper from denying that it assented to the conditions of the bill of lading, even though such would be the rule in ordinary contracts.

5. SAME—*acceptance of shipment by carrier is prima facie a contract to deliver at destination.* Acceptance by a carrier of a consignment marked to a point beyond the terminus of its line constitutes a *prima facie* contract to carry and deliver safely to the place so marked, with all the liabilities and duties of a common carrier; but the carrier may limit its obligation of safe carriage to its own line, and if the shipper assents thereto he is bound.

6. SAME—*limitation in that part of the bill of lading constituting the receipt is unlawful.* A limitation of the carrier's common law liability to safely deliver property to its destination is unlawful, under the statute, if it is contained in that part of the bill of lading constituting the receipt for the goods, but it is not unlawful if it is contained in that part of the bill of lading which constitutes the contract, if the shipper assents to the restriction.

7. SAME—*restriction of common law liability requires express contract.* A carrier's common law liability cannot be restricted merely by notice of any limitation, and the carrier is bound to receive and carry goods offered for transportation, subject to all the incidents of the employment, unless some exception from liability is given by express contract.

8. SAME—*whether a shipper assented to restriction is always matter of evidence.* There is no presumption that a shipper intends to part with any of his legal rights, but if a limitation of liability is understandingly assented to by the shipper it will bind him whether he signs any agreement or not, and the question whether such restrictions have been assented to in any particular case is always a matter of evidence.

9. SAME—*when carrier is entitled to have evidence of shipper's assent go to jury.* Evidence that the shipper was engaged in an extensive manufacturing business and constantly shipped car-load lots to points beyond the terminus of the carrier; that it used its own shipping orders, directing shipment "as per conditions" of the bill of lading, and that it constantly received bills of lading containing a limitation of safe carriage to the carrier's own line, raises an inference of assent by the shipper to such limitation, and the carrier is entitled to have such evidence submitted to the jury upon correct instructions as to the law.

10. INSTRUCTIONS—*instructions should be so drawn as to apply to the case.* Instructions should be so drawn as to apply to the case to be decided by the jury, but the fact that they are mere statements of rules of law is not ground for reversal, provided they are correct and not misleading as applied to the facts of the case.

11. SAME—*if instructions lay down contradictory rules they are misleading.* If instructions lay down contradictory rules, so that the following of one rule will lead to a different result from following the other, the instructions are defective and misleading.

12. SAME—*when instruction as to carrier's liability is incorrect as applied to the case.* An instruction which states that the defendant carrier can only relieve itself from liability as an insurer by showing that the loss occurred by the act of God or the public enemy, or by reason of some failure or neglect of the shipper, or

from the inherent nature of the goods, which could not have been prevented by the exercise of ordinary care on the part of the carrier, is incorrect, where the loss occurred beyond the defendant's line and there was a restriction of liability to its own line and evidence tending to show assent thereto by the shipper.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. A. O. MARSHALL, Judge, presiding.

J. L. O'DONNELL, T. F. DONOVAN, and J. A. BRAY, (WINSTON, PAYNE, STRAWN & SHAW, of counsel,) for plaintiff in error.

KNOX & AKIN, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On June 16, 1904, the defendant in error, the Illinois Match Company, delivered to the plaintiff in error, the Chicago, Rock Island and Pacific Railway Company, a car-load of matches consigned to John T. Huner, Our Darling Siding, Queen's county, New York. The plaintiff in error delivered the car at Chicago to the Lake Shore and Michigan Southern Railway Company, which forwarded the car to New York, and in the evening of June 21, 1904, the matches were destroyed by fire while the car was standing on a storage track of the New York Central and Hudson River Railroad Company in New York City. Defendant in error sued the plaintiff in error in the circuit court of Will county for the damages occasioned by the loss of the matches and recovered a judgment of \$1404.71, which was affirmed by the Appellate Court for the Second District. The record has been brought to this court by virtue of a writ of *certiorari* granted for that purpose.

The only substantial defense interposed and the only one mentioned or insisted upon in the brief and argument in this court is, that there was a special contract entered into by the parties which limited all liability of the defendant to loss occurring upon its own lines. If there was such contract the defendant was not liable for the loss, and if there was not, there was no defense to the suit.

The plaintiff was a manufacturer of matches at Joliet and shipped them to all parts of the United States. Its shipments by the defendant's railroad and another railroad at Joliet amounted to from one hundred to one hundred and fifty car-loads a year, besides other shipments of less than car-load lots. The plaintiff had sold and shipped matches to John T. Huner, and in June, 1904, he bought twenty-five car-loads from it, which were shipped as fast as they were manufactured. The plaintiff caused to be printed and kept for its own use a blank shipping order, with places for the name of the railroad company to which the car was delivered at Joliet and the name and address of the consignee, and containing directions to deliver the car in good order without unnecessary delay, "as per conditions of company's bill of lading." After the car in question was loaded, one of these shipping orders, directed to the defendant and containing the name and address of the consignee, was delivered to the defendant. The defendant then made and delivered to the plaintiff a bill of lading, signed by its agent, acknowledging the receipt of the car-load of matches, to be delivered to the next carrier to be carried to its destination, and both in that part of the bill of lading which constituted the receipt and the subsequent portion containing the agreement of the defendant there was a limitation of liability to the defendant's own lines. It contained an agreement that the defendant assumed no responsibility for the safe carriage of the matches, or for their safety, except on its own road. The secretary of the plaintiff testified that when he made out the shipping order he did not know what the

conditions of the defendant's bill of lading were; that his attention had never been called to the conditions in its bills of lading and that he never read the bill of lading for this car. The treasurer and manager of the plaintiff, who received the bill of lading, testified that he read only the written portions and had never read the other provisions and conditions and did not know until the trial what they were, and that he never talked with the defendant or any of its agents as to whether the plaintiff would be bound by the conditions in the bill of lading. The president testified that prior to the trial he never read or examined the form of the bill of lading and never knew of the terms and conditions. There was another general officer of the plaintiff, but he had nothing to do with shipping goods. The secretary was asked whether the plaintiff ever assented or agreed with the defendant that the plaintiff should be bound by the conditions contained in the bill of lading, and the court overruled an objection to the question. The ruling was wrong as it called for a mere conclusion, but the answer of the witness was that, speaking as a representative of the company, he had never, and so far as he knew no other representative of the company had ever, so consented. While the answer was somewhat in the nature of a conclusion it was a necessary one from the testimony of that witness and others and would not be ground for a reversal of the judgment.

Where two written instruments are executed as the evidence of one transaction, they will be read and considered together as one instrument in arriving at the intention of the parties. (*Gardt v. Brown*, 113 Ill. 475; *Crandall v. Sorg*, 198 id. 48; *Gould v. Magnolia Metal Co.* 207 id. 172; 1 Greenleaf on Evidence, sec. 283.) Under that rule the shipping order delivered by the plaintiff to defendant and the bill of lading delivered by defendant to plaintiff constituted the contract between the parties for the carriage of the matches. (4 Elliott on Railroads, sec. 1424.) That

being so, it is contended that the plaintiff was estopped by the shipping order from asserting that it did not agree to the conditions of the bill of lading. That is true as to ordinary contracts, (*Wynkoop v. Cowing*, 21 Ill. 570,) and the general rule was applied to such contracts as this in *Black v. Wabash, St. Louis and Pacific Railway Co.* 111 Ill. 351. But that decision was overruled in *Wabash Railroad Co. v. Thomas*, 222 Ill. 337, where it was held that even if the shipper signs the bill of lading containing limitations on the liability of the carrier, the burden is still on the carrier to show by evidence *aliunde* that the restrictions or limitations of the common law liability contained therein were assented to by the shipper. Of course, this does not mean that there must be a verbal contract in addition to the written one, but means that the evidence must show that the contract was understandingly entered into by the shipper and its limitations assented to. If this is the rule, it must apply where the contract consists of two instruments instead of only one, and the conclusion whether this contract was assented to by the plaintiff must depend upon other evidence than the writing.

The acceptance by the defendant of the car-load of matches marked to a place beyond the terminus of its line constituted a *prima facie* contract to carry and deliver at the place so marked, with all the liabilities and duties of a common carrier. (*Erie Railway Co. v. Wilcox*, 84 Ill. 239; *Chicago and Northwestern Railway Co. v. Simon*, 160 id. 648.) The carrier may limit its obligation to carry goods safely to its own lines although they are marked to a point beyond, and if such restriction is assented to by the shipper it will bind him. (*Erie Railway Co. v. Wilcox*, *supra*.) The statute provides that it shall not be lawful for a carrier to limit its common law liability to safely deliver property received by it at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property. The limitation contained in

that part of the bill of lading acknowledging the receipt of the property was therefore in violation of law and of no effect, but the common law liability may be limited by that part of the bill of lading which constitutes a contract if the shipper assents to the restrictions. (*Chicago and Northwestern Railway Co. v. Simon, supra.*) A bill of lading is both a written acknowledgment of the receipt of goods and also an agreement for a consideration to transport and deliver the same at the specified place to a person therein named, or his order. It has the two-fold character of a receipt and an agreement. (4 Elliott on Railroads, sec. 1415; 4 Am. & Eng. Ency. of Law,—2d ed.—510.) The common law liability cannot be restricted merely by notice of any limitation, and the carrier is bound to receive and carry goods offered for transportation, subject to all the incidents of the employment, unless some exemption from liability is given by express contract. There is no presumption that the shipper intends to abandon any of his legal rights, but if a limitation of liability is understandingly assented to by him it will bind him whether he signs any agreement or not, and whether such restrictions have been assented to in a particular case is always a matter of evidence. (*Western Transportation Co. v. Newhall*, 24 Ill. 466; *Merchants Despatch Transportation Co. v. Theilbar*, 86 id. 71; *Boscowitz v. Adams Express Co.* 93 id. 523.) In this case the plaintiff was constantly shipping matches in car-load lots, and otherwise, by rail from Joliet to points beyond the lines of the railroads and received bills of lading from the defendant containing the conditions and restrictions of the one in question. It was using shipping orders directing shipments "as per conditions of company's bill of lading." Its officers testified that they never read a bill of lading and did not know its contents. The facts proved by the defendant would raise a natural inference that the plaintiff, through its officers or agents, knew the conditions of bills of lading and by the shipping order intended that the matches

should be shipped on the conditions therein specified and thereby assented to the limitations therein contained. The defendant had a right to have the evidence in its favor submitted to the jury upon correct instructions as to the law. The court gave at the request of the plaintiff thirteen instructions, and with one exception they were mere abstract statements of rules relating to the duties and liability of common carriers of goods received for transportation. Instructions should be so drawn as to apply to the case to be decided by the jury, but if the instructions are not misleading it is not ground for reversal that they are mere statements of rules of law. (*Chicago City Railway Co. v. Anderson*, 193 Ill. 9.) These instructions, however, were misleading, both because they ignored the real matter in controversy and were incorrect as applied to the case. Instruction 5 will show the general character of the instructions, and it is as follows:

"The court instructs the jury that a common carrier is an insurer for the safe transportation and delivery of goods entrusted to it for carriage, and in case of loss or injury to such goods it can only relieve itself from liability as an insurer by showing that the loss or injury was occasioned either by an act of God or the public enemy, or by reason of some neglect or failure of the shipper, or that the loss or injury resulted from the inherent nature of the goods, which the exercise of ordinary care on its part would not have prevented."

If the jury accepted that instruction as the law, a verdict for the plaintiff was inevitable and the defense was wholly eliminated. The jury, applying the instruction to this case, would necessarily say that the defendant could only relieve itself from liability as an insurer by showing that the loss of the matches was occasioned either by an act of God or the public enemy, or by reason of the neglect of the shipper, or that the loss resulted from the inherent nature of the goods, which the exercise of ordinary

care on its part would not have prevented. Such instructions could only be justified if the defendant was not entitled to have its defense submitted to the jury at all, and could only be sustained in a case where the court ought to have directed a verdict. The court did tell the jury, as requested by the defendant, that if the plaintiff assented to the conditions of the bill of lading it could not recover unless the loss occurred while the goods were in the defendant's possession or was caused by the negligence of the defendant or its servants, but that was merely contradicting the instruction above quoted; and if instructions lay down contradictory rules, and following one rule would lead to a different result than would be arrived at by following another, the instructions are defective and misleading. *Gilmore v. Fuller*, 198 Ill. 130; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Best*, 169 id. 301.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

JOHN W. KLINE *et al.* Appellants, *vs.* CHARLOTTE L. BARNES *et al.* Appellees.

Opinion filed June 20, 1911.

1. CONSTITUTIONAL LAW—*doubts as to constitutionality of statute are resolved in its favor.* All doubts or uncertainties as to the constitutionality of an act must be resolved in its favor.

2. SAME—*provision for an appeal is germane to act concerning jurisdiction of court.* A provision for an appeal or writ of error is germane to and within the title of an act conferring jurisdiction upon a court.

3. SAME—*section 3 of act of 1909, giving circuit courts concurrent jurisdiction in drainage cases, is valid.* Section 3 of the act of 1909, (Laws of 1909, p. 171,) giving circuit courts concurrent jurisdiction with county courts in drainage proceedings, is not invalid because it provides for an appeal to the Supreme Court

whereas no mention is made of such appeal in the title, as the provision for an appeal is germane to and within the title.

4. *DRAINAGE—dissolution of district is within the act of 1909.* The act of 1909, conferring upon circuit courts concurrent jurisdiction with county courts in drainage proceedings, was intended to, and does, embrace proceedings for the dissolution of drainage districts under the act of 1889.

5. *SAME—appeal from order of county court denying petition to dissolve district lies to Supreme Court.* Under the act of 1909 an appeal from an order of the county court denying a petition to dissolve a drainage district lies to the Supreme Court, and the circuit court has no jurisdiction to entertain such appeal. (*Myers v. Newcomb Drainage District*, 245 Ill. 140, explained.)

APPEAL from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

S. L. WALLACE, DONALD McCORMICK, PETER MURPHY, and HUMPHREY & ANDERSON, for appellants.

KING & MILLER, and BEACH & TRAPP, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellants, John W. Kline and E. W. Bates, were two of a large number of persons who signed and presented to the county court of Logan county a petition for the dissolution of the Salt Creek Special Drainage District, in said Logan county. The petition for dissolution of the district was filed under the provisions of the act of June 4, 1889, which gives the county court jurisdiction to dissolve a drainage district upon a petition signed by not less than four-fifths of the adult land owners who own not less than three-fourths in area of the land assessed, upon due notice being given as required by the act. A hearing was had upon the petition, and at the December term of the county court a judgment was entered denying the petition and dismissing the same. Kline and Bates, two of the petitioners, appealed from the judgment of the county court to the circuit court of Logan county. In the circuit court appel-

lees moved to dismiss the appeal on the ground that the circuit court had no jurisdiction to entertain the appeal and that it should have been prosecuted directly to the Supreme Court. The circuit court sustained the motion and dismissed the appeal. From that judgment Kline and Bates have prosecuted an appeal to this court.

If the circuit court had no jurisdiction to entertain the appeal the judgment of that court was right and must be affirmed. By an act of the legislature approved and in force June 5, 1909, entitled "An act to give circuit courts of this State, and the superior courts of Cook county, in term time, and judges thereof in vacation, concurrent jurisdiction with the county courts, in all matters pertaining to the organization of farm drainage districts, and farm drainage and levee districts, and the operation thereof, and to [repeal] all acts in conflict herewith," (Laws of 1909, p. 171,) circuit courts and the superior courts of Cook county were given concurrent jurisdiction with county courts "in all matters pertaining to the organization of farm drainage districts, and farm drainage and levee districts, and the operation thereof; and when proceedings under this act are pending in the circuit court, such court shall have power to make all necessary orders affecting the district or its officers as fully as is now vested in the county courts," and it is made the duty of the clerk of the circuit court to perform the same acts required of the clerk of the county court when the proceedings are pending in the county court. Section 3 of the act is as follows: "Appeals may be taken from the final orders, judgments and decrees from either of the county or circuit courts to the Supreme Court." If that act is a valid act, then it is clear the circuit court had no jurisdiction to entertain the appeal and it should have been prosecuted from the county court directly to this court.

Appellants say it is doubtful whether the third section of the act is constitutional, in that it provides for appeals

to the Supreme Court, which subject is not mentioned or referred to in the title of the act. The rule is that all doubts or uncertainties as to the constitutionality of an act must be resolved in favor of its validity. (*Claffy v. Chicago Dock Co.* 249 Ill. 210.) But we do not consider the validity of section 3 even doubtful. It is germane to the subject expressed in the title. (*Fleischman v. Walker*, 91 Ill. 318.) The Appellate Court act is entitled "An act to establish Appellate Courts," but it contains provisions for appeals to the Supreme Court. The Municipal Court act of the city of Chicago is entitled "An act in relation to a municipal court in the city of Chicago," and contains provisions for appeals to and writs of error from the Appellate and Supreme Courts. Such provisions are necessary for the accomplishment of the legislative purpose, and do not violate the constitutional provision that no act shall embrace more than one subject, and that shall be expressed in the title. "An act may contain many provisions and details for the accomplishment of the legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision." *People v. McBride*, 234 Ill. 146.

It is further contended by appellants that the act of 1909 does not confer upon circuit courts concurrent jurisdiction with county courts in proceedings for the dissolution of drainage districts, and that appeals from orders in that class of proceedings are not governed by the act of 1909. We are of opinion said act was intended to be, and is, broad enough to include proceedings for the dissolution of drainage districts. In *Beatty v. Zimmerman*, 249 Ill. 180, this court entertained an appeal direct from the county court from a judgment of said court dismissing a petition to dissolve a drainage district, and in *Boston v. Kickapoo Drainage District*, 244 Ill. 577, we entertained a writ of error to review a judgment of the county court rendered October 1, 1909, denying a petition, filed under the provi-

sions of section 44 of the Levee act, to abandon and abolish a district. While it is not so stated in *Myers v. Commissioners of Newcomb Special Drainage District*, 245 Ill. 140, the fact is, in that case the judgment the writ of error was sued out to review was rendered before the passage of the act of 1909.

In our opinion the circuit court properly dismissed the appeal, and its judgment is affirmed.

Judgment affirmed.

AMANDA J. HILL, Appellant, *vs.* JULIA I. KREIGER *et al.*
Appellees.

Opinion filed June 20, 1911.

1. DEEDS—*no particular form is essential to constitute delivery.* While delivery and acceptance are essential to render a deed operative as a conveyance, no particular form or ceremony is required.

2. SAME—*delivery may be by acts or words, or both.* A delivery may be by acts without words or words without acts, or by both acts and words, and anything which clearly manifests the intention of the grantor that the deed shall presently become operative and effectual, that he loses control over it and the grantee is to become possessed of the estate, constitutes sufficient delivery.

3. SAME—*intention with which acts are done is the test.* The test in each case is the intention with which the act or acts relied on as the equivalent or substitute for a formal delivery were done, and each case must therefore be judged by its own circumstances.

4. SAME—*what is essential in case of ordinary deed of bargain and sale.* In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish delivery, that the deed pass beyond the control and dominion of the grantor, and there must also, in such case, be an acceptance by the grantee, and the mere recording of a deed of bargain and sale without the grantee's consent does not constitute either delivery or acceptance.

5. SAME—*law presumes more in favor of delivery of voluntary conveyance.* A deed of voluntary settlement, if fairly made, is binding upon the grantor unless there is clear proof that he never parted with or intended to part with the possession of the deed, and the deed will be regarded as delivered although he retains it,

unless there are other circumstances to show that it was not intended to be absolute.

6. SAME—*acceptance by grantee is presumed in case of voluntary conveyance.* If the grantee knows of the execution of a voluntary conveyance an acceptance will be presumed, in the absence of other proof, on account of the beneficial nature of the gift.

7. SAME—*actual delivery to and acceptance by infant grantee in voluntary conveyance is unnecessary.* In case of a voluntary conveyance to an infant grantee actual delivery and acceptance is unnecessary, nor is it necessary that the infant have knowledge of the conveyance; and it is the duty of the court to declare an acceptance for him where the conveyance is beneficial.

8. SAME—*recording of voluntary conveyance to infant grantee is prima facie evidence of delivery.* In case of a deed of voluntary settlement the intention of the grantor to presently vest title in the grantee is of more importance than the manual possession of the deed, and in the case of an infant grantee the recording of the deed by the grantor, or at his direction, is *prima facie* evidence of a delivery.

9. SAME—*grantor's retention of deed not inconsistent with delivery where life estate is reserved.* Where the grantor reserves a life estate in the property and its possession and control, the retention of the deed by him is not inconsistent with the idea that delivery was intended and that the deed is presently operative as a conveyance of the future estate, which is to vest in possession at the termination of the life estate.

10. SAME—*when deed is operative.* A voluntary conveyance of land to the grantor's daughter and her minor children, which is subject to the dower of the grantor's wife and provides that possession shall be given at his death, is operative as a conveyance even though the grantor refused to deliver the deed after it was recorded but kept it in his possession until a few days before his death, when he gave it, with other papers, to his sons, where the evidence shows he regarded the conveyance as operative and believed the title had passed beyond his control.

11. SAME—*effect of possession and payment of taxes by grantor, who has a life estate.* Where the grantor in a deed of voluntary settlement reserves a life estate, his possession of the deed and his possession of the property and payment of taxes are referable to the life estate and are not inconsistent with the title of the grantees.

APPEAL from the Circuit Court of Christian county;
the Hon. A. M. ROSE, Judge, presiding.

HOGAN & WALLACE, for appellant.

J. A. MERRY, and FRANK P. DRENNAN, for appellees.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

Delivery of a deed by the grantor, and acceptance by the grantee, is essential to constitute a conveyance. (*Wiggins v. Lusk*, 12 Ill. 132; *Kingsbury v. Burnside*, 58 id. 310; *Moore v. Flynn*, 135 id. 74; *Sullivan v. Eddy*, 154 id. 199.) The appellant, Amanda J. Hill, relying upon that rule of law and claiming that a deed made by her father to her and her four minor children was inoperative to convey title for want of delivery, filed her bill in the circuit court of Christian county against the appellees, her said children, Julia Irene Kreiger, Dora Belle Scott, Charles Wilbur Parish and Herschel Orren Parish, asking the court to set aside the deed as a cloud upon the title which she claimed by inheritance from her father and a conveyance from his other heirs-at-law. Julia Irene Kreiger answered the bill, and the other defendants, who were still minors, answered by a guardian *ad litem*. The court heard the evidence, which established the following facts:

On November 10, 1906, when the deed was made, Andrew L. Augur was the owner of much land and other property in Christian county, and had four children, John W. Augur, Calvin L. Augur, Mary L. Butcher and complainant, who was then the wife of Charles Parish. Andrew L. Augur had given to each of his children a gift of \$8000 in money and determined to also make a gift of land to each of them. Accordingly he made four deeds, each for 120 acres of land, one to John W. Augur, one to Calvin L. Augur, one to Mary L. Butcher and the fourth to the complainant and her four children, Julia Irene Parish, Dora Belle Parish, Charles Wilbur Parish and Herschel Orren Parish, as tenants in common. The deeds were

made subject to the dower of the grantor's wife, Emily Augur, and provided that possession was to be given at his death. The two sons were present and the deeds were written by one of them. The grantor directed the deeds to be sent to the recorder and recorded, and upon a suggestion that they should be delivered to the grantees he refused and ordered them returned to him, but he gave no reason for retaining possession of them. He said that he had the deed to the complainant and her children made in that way so that the complainant's husband, Charles Parish, could not induce her to mortgage the land, and that it would have been all right for her to have had the land except for that reason. The complainant knew of the making of the deed to her and her children a few days after it was made, and her father then told her that he had done something that he did not want to do, and that the reason why he did it was that he did not want her husband to mortgage the land. Charles Parish afterward died, and the complainant then tried to induce her father to make a deed direct to her. In the summer of 1909 she had a deed prepared and tried to persuade him to sign it, but he refused, saying that he did not want to change it; that he did not have his business fixed the way he wanted it but he would not re-fix it. He was told the deeds were not good unless delivered to the grantees, but he said he thought they were good enough; that he thought he could not sign the new deed; that he would do it in a minute if he thought he could, but he thought it would not stand, and that he had already conveyed the land. Andrew L. Augur retained possession of the premises, had control of them and paid the taxes until his death, which occurred on August 15, 1909. A few days before his death his sons took his papers with his consent, and the deeds were found among the papers. He left Emily Augur, his widow, and his four children his only heirs-at-law. Emily Augur, the widow, afterward died, and the complainant was married a second time and her

name is now Amanda J. Hill. After the death of complainant's father the deed to her and her children was offered to her, and she at first refused to take it but was persuaded to do so. The heirs then exchanged deeds between themselves to render effective the deeds to Calvin L. Augur, John W. Augur and Mary L. Butcher, and those persons conveyed to the complainant all their interest, as heirs-at-law of their father, in the 120 acres described in the deed in question. When the deed was made Julia Irene was sixteen years old, Dora Belle was fourteen, Charles Wilbur was five and Herschel Orren was two. Julia Irene attained her majority and was married, and her name is Julia Irene Kreiger. Dora Belle was married to one Scott, and reached the age of eighteen years during the pendency of the suit. The court dismissed the bill for want of equity, and the complainant appealed.

While delivery and acceptance are essential to render a deed operative as a conveyance, no particular form or ceremony is required. A delivery may be by acts without words or words without acts, or both, and anything which clearly manifests the intention of the grantor that a deed shall presently become operative and effectual, that he loses control over it and the grantee is to become possessed of the estate, constitutes a sufficient delivery. The test in each case is the intention with which the act or acts relied on as the equivalent or substitute for a formal delivery were done, and each case must therefore be judged by its facts and circumstances. The necessity of so doing and the varying conclusions drawn from different states of facts led Mr. Justice Mulkey, in the case of *Weber v. Christen*, 121 Ill. 91, to regard it as difficult to fully harmonize the decisions on any well recognized principle. That is true in the sense that no two states of circumstances are exactly alike, but certain principles upon which the conclusion must rest in each case are well established. In the same case it was said that in the case of an adult grantee the acknowl-

edging and recording of a deed without his knowledge or consent would not, of itself, amount to a delivery, but if, from all the circumstances, it appears that the grantor by his acts intended to give effect and operation to the deed and relinquish all power and control over it, such acts would amount to a delivery. It may appear from the facts and circumstances that the grantor, in delivering a deed to a recorder to be placed on record, intended to part with his title and that he delivered it for the benefit of the grantee, while under other circumstances no such presumption would arise. In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed passes beyond the dominion and control of the grantor, since both the grantor and the grantee cannot have control of the deed at the same time. (*Provart v. Harris*, 150 Ill. 40.) There must also be an acceptance of the conveyance by the grantee, and where the facts do not show an actual acceptance nor justify a presumption of law that the deed has been accepted, the title does not pass. Accordingly it is held that the recording of such a deed by the grantor without the knowledge and consent of the grantee does not constitute either a delivery or acceptance. (*Brown v. Brown*, 167 Ill. 631; *Dagley v. Black*, 197 id. 53.) Under some circumstances the recording of a deed may afford *prima facie* evidence of delivery and acceptance, but if the deed creates any liability against the grantee or imposes any obligation upon him an acceptance cannot rest upon any presumption but the acceptance must be of an affirmative character. *Thompson v. Dearborn*, 107 Ill. 87.

The deeds made by Andrew L. Augur were voluntary settlements upon the grantees, and in such cases the law presumes much more in favor of a delivery than it does in ordinary business transactions. Such a settlement, when fairly made, is binding on the grantor, unless there be clear and decisive proof that he never parted or intended to part

with the possession of the deed, and it will be regarded as delivered although he retains it, unless there are other circumstances to show that it was not intended to be absolute. (*Otis v. Beckwith*, 49 Ill. 121; *Cline v. Jones*, 111 id. 563; *Shults v. Shults*, 159 id. 654; *Brady v. Huber*, 197 id. 291; *Creighton v. Roe*, 218 id. 619.) The rule in such cases results from the presumed intention of the grantor to make his act effectual, the relation of the parties to each other and the trust and confidence reposed. If the grantee knows of the conveyance an acceptance will also be presumed, in the absence of other proof, on account of the beneficial nature of the gift. It would naturally be inferred that one would consent to and accept a conveyance for his benefit. The law adds other presumptions where a voluntary conveyance is made to an infant or one under some disability. The actual delivery to and acceptance by such a grantee is never necessary. An infant is incapable of doing any act in regard to a deed which he may not avoid on reaching his majority, and it was not unnatural for one sustaining the relation which existed between Andrew L. Augur and the infant children of his daughter to preserve the deed for them. (*Masterson v. Cheek*, 23 Ill. 72; *Hayes v. Boylan*, 141 id. 400; *Wilenou v. Handlon*, 207 id. 104; *Abrams v. Beale*, 224 id. 496.) As an infant or one under disability is incapable of making any formal and valid acceptance his knowledge of the conveyance is not necessary, and it is the duty of the court to declare an acceptance for him where the conveyance is beneficial. The grantor's intention to presently vest title in the grantee in the case of a voluntary settlement is regarded as of more importance than the mere manual possession of the deed, and in the case of a conveyance to an infant the recording of a deed by the grantor or by his direction is *prima facie* evidence of a delivery. *Blankenship v. Hall*, 233 Ill. 116.

Where the grantor reserves a life estate in the property and its possession and control, the retention of the deed is

not inconsistent with the idea that delivery was intended and that the deed is operative. (*Valter v. Blavka*, 195 Ill. 610.) Such a reservation raises a presumption that the deed is intended to operate immediately as a conveyance of the future estate which is to vest in possession at the termination of the life estate, since there would be no object in reserving a life estate if the deed was not to be effectual as a conveyance or was retained to prevent its taking effect until the death of the grantor. *Baker v. Hall*, 214 Ill. 364; *Riegel v. Riegel*, 243 id. 626.

The deed in question was made by Andrew L. Augur to his daughter and her four infant children as a voluntary conveyance and is governed by the rules applicable to deeds of that kind. The infant grantees were grandchildren of the grantor, and the presumption would be that his possession of the deed was for their benefit even if he had not retained a life estate. The grantor reserved a life estate and unquestionably intended the deed to become operative at once as a conveyance of the future estate, subject to the dower of his widow, if she should survive him. The possession of the deed by the grantor, who had a life estate in the property, was not inconsistent with the title of the grantees in the deed, and his possession and payments of taxes are referable to such life estate. The grantor believed and understood that the title had passed beyond his control and that he had conveyed the property to the complainant and her minor children. His intention was clearly proved, and the necessary conclusion is that the recording of the deed was intended as a delivery for the benefit of the grantees. The complainant was not entitled to have the deed set aside, and the decree of the court is right and is affirmed.

Decree affirmed.

THE WALTER CABINET COMPANY, Plaintiff in Error, vs.
SAMUEL A. RUSSELL, *et al.* Defendants in Error.

Opinion filed June 20, 1911.

1. PRACTICE—*when filing affidavit and claim of set-off in the municipal court is unauthorized.* Under the rules of the municipal court of Chicago a defendant in a case of the fourth class must file his affidavit and claim of set-off with his appearance unless the court extends the time for filing it, and if he files the affidavit and claim without complying with the rule, neither the court nor the plaintiff is required to notice them in any way.

2. SAME—*when plaintiff in municipal court is not in default for want of affidavit of merits of defense.* Under the rules of the municipal court of Chicago a plaintiff is required to file an affidavit of merits of defense to a claim of set-off within such time as the court may order, and he is therefore not in default for want of such affidavit before the court has made an order fixing the time for filing it.

3. SAME—*effect of denial of a motion to strike claim of set-off from files.* The denial of a motion by the plaintiff to strike defendant's affidavit and claim of set-off from the files because they were not filed with his appearance or by any leave of court is equivalent to an order then made extending the time for filing such affidavit and claim and is within the discretion of the court.

4. SAME—*court has no power to enter judgment without hearing because party is in contempt.* There is no statute authorizing a court, because a plaintiff has refused to obey an order to produce books, to strike his pleadings from the files and enter a judgment for the defendant for the full amount of his claim of set-off without any proof whatever.

5. CONSTITUTIONAL LAW—*constitution requires inquiry before judgment.* The constitutional guaranty of due process of law, without which no person may be deprived of his property, requires inquiry before judgment and hearing before condemnation; and while the contumacy of a party in disobeying an order of the court may justify his punishment for contempt, it does not justify depriving him of his civil rights or taking his property and giving it to another.

6. EVIDENCE—*purpose of section 9 of Evidence act, concerning order to produce books and papers.* Section 9 of the Evidence act, authorizing a court to enter orders to produce books and writings in a party's possession, provides a summary way of obtaining written evidence pertinent to the issue, but such power cannot be

used to procure a general investigation of the accounts or business of a party or of any transaction not material to the issue.

7. SAME—*when an order requiring plaintiff to produce books is unauthorized.* An order requiring the plaintiff in a fourth-class case in the municipal court of Chicago to produce certain books and writings is unauthorized, where the evidence contained therein is pertinent only as to the defendant's claim of set-off, which at the time was not an issue in the case because the affidavit and claim, having been filed without leave and without authority of law, could not lawfully be considered by the court.

8. SAME—*court cannot create any presumption of fact where party refuses to produce books.* It is the province of the legislature to prescribe rules of evidence, and it is not within the power of the court, in the absence of any statute, to create a presumption of fact that the books which a party refuses to produce would, if produced, present evidence against him, and on the strength of such presumption strike his pleadings from the files and enter judgment for the opposite party's claim without any proof.

9. COURTS—*issues in the municipal court cannot be enlarged by oral claims or affidavits.* While the Municipal Court act has abolished formal pleadings in fourth-class cases, still the law requires the filing of statements of claim and of set-off for the purpose of forming an issue, to which the parties are to be confined in their evidence and which cannot be changed by oral claims or affidavits.

WRIT OF ERROR to the Municipal Court of Chicago;
the Hon. WILLIAM N. GEMMILL, Judge, presiding.

MOSES, ROSENTHAL & KENNEDY, (WALTER BACH-
RACH, and E. D. WALLACE, of counsel,) for plaintiff in
error.

EARL J. WALKER, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error sued the defendants in error in a case of the fourth class in the municipal court of Chicago upon an attachment bond. The appearances of the defendants were entered on December 2, 1910, and an extension of time for filing an affidavit of merits was granted to them. On December 9, without any leave of court, the

defendant in error Russell filed a statement of set-off and affidavit, but no order was then or afterward made in regard to the plaintiff's affidavit of merits of defense and no such affidavit of merits was filed by the plaintiff. The statement of set-off claimed \$375 from the plaintiff "for commission on goods sold for the plaintiff by the said defendant." On December 12, upon the motion of defendant in error Russell, an order was made, over the objection of the plaintiff in error, requiring it to produce on December 19, 1910, for the defendant's inspection and examination, all books, papers and memoranda showing orders and sales of furniture cabinets of the plaintiff in that part of the United States between St. Paul, Minnesota, and Galveston, Texas, west of Lake Michigan and east of Colorado. On December 16 the plaintiff in error moved to strike from the files the statement and affidavit of set-off because they were not filed with the defendant's appearance and no leave was given to file them. This motion was denied. On December 23 defendant in error Russell moved to strike from the files the plaintiff's statement of claim and to render judgment in favor of the defendant for the amount of his set-off. In support of his motion he read to the court affidavits showing that the plaintiff in error had failed and refused to comply with the order of December 12 in regard to the production of books and papers and did not intend to comply with that order, and the plaintiff in error, by its counsel, stated that the order would not be complied with. The court sustained the motion, the plaintiff's statement of claim was stricken from the files, and judgment was entered against the plaintiff, in favor of the defendant Russell, for the amount of his set-off, \$375, and costs, and in favor of the defendant the American Surety Company for costs. A writ of error to review this record was sued out of this court, and it is urged that the order of December 12 and the judgment of December 23 were beyond the constitutional power of the court.

The filing of a statement of set-off by a defendant sued in the municipal court is governed by rule 18 of that court, which provides that in cases of the fourth class such statement shall be filed with the defendant's appearance, provided that the court may extend the time for filing it. The same rule provides that the plaintiff shall be required to file an affidavit of merits of defense to a set-off within such time as the court may order. A plaintiff cannot, therefore, be in default for want of an affidavit of merits of defense until the court has made an order fixing the time within which the affidavit must be filed. Still less ground is there for holding the plaintiff in default where the defendant's statement of set-off has been filed after the time limited by the rule and without leave of the court. After the expiration of the rule the defendant had no right to plead without special leave of the court, and neither the court nor the plaintiff was required to recognize in any way the statement of claim thus placed among the papers in the cause without authority of law. *Robb v. Bostwick*, 4 Scam. 115; *Flanders v. Whittaker*, 13 Ill. 707; *Davis v. Lang*, 153 id. 175.

Section 9 of chapter 51 of the Revised Statutes provides that the courts may require parties to produce books or writings in their possession which contain evidence pertinent to the issue. The object of this section is to furnish litigants a summary means of obtaining written evidence pertinent to the issues in a cause which may be in the possession of the opposite party. It serves the purpose, in a more speedy and summary way, intended to be accomplished by a bill of discovery in some cases or a subpoena *duces tecum* in others. It cannot be used to procure a general investigation of the accounts or business of a party or of any transaction not material to the issue. At the time the order for the production of books and papers was made in this case the only issue was upon the plaintiff's claim upon the attachment bond, as to which there is no claim that there was any evidence in the books. The statement

of set-off had been filed without authority of law, no leave was then asked to file it, the plaintiff was under no obligation to answer it, and in that condition of the record it should have been disregarded by the court upon the hearing of the motion to require the production of books. Had the court, however, then given leave to file the statement, the order to produce the plaintiff's books would still have been improper. The claim presented by the statement was for commissions on sales made by the defendant Russell for the plaintiff. The order was for the production of all books, invoices, memoranda and writings showing orders and sales of furniture cabinets of the plaintiff within the territory described. It called for a general exposition of all the plaintiff's business throughout that territory, of all sales of the plaintiff's articles, and was not limited to the issue of sales made by Russell. Such an order cannot be justified as pertinent to the defendant's claim even if such claim were to be considered as properly in the case.

It is urged that the affidavit of Russell read in support of the motion set forth a contract giving him the exclusive right to sell furniture in the territory named, by which he was entitled to a commission on all accepted orders, whether from himself direct or by mail from the described territory. This affidavit, however, did not make the issue and was no evidence of the issue. In fact, it was no part of the record except as it was made so by including it in a bill of exceptions or stenographic report. The object of the rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in the municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement. The

issue cannot be enlarged by oral claims or affidavits filed in the case.

It is not intended to hold that the action of the court in denying the motion of the plaintiff in error, on December 16, to strike the statement of set-off from the files was erroneous. The denial of this motion was equivalent to an order then made extending the time for filing the statement, and was within the discretion of the court. But on December 12 no such order had been made, and nothing appears in the record to show that the statement of set-off had then ever been recognized or brought to the attention of the plaintiff or the court.

The order striking from the files the plaintiff's statement of claim and entering judgment against it, without any proof whatever, for the full amount of the defendant's claim was without authority of law. The constitutional guaranty of due process of law, without which no person may be deprived of his property, requires inquiry before judgment, hearing before condemnation. The contumacy of a party in disobeying the order of a court may justify his punishment for contempt, but not the deprivation of his civil rights or the taking of his property and giving it to another. The judgment here, though purporting to be a judicial determination of the rights of the parties, is, in fact, only an arbitrary declaration of the judge having no reference to such rights. The plaintiff in error, so far as the set-off of the defendant in error Russell was concerned, occupied the position of a defendant, and it is a principle of fundamental justice that, however plenary may be the power to punish for contempt, no court, having obtained jurisdiction of a defendant, may refuse to allow him to answer, refuse to consider his evidence and condemn him without a hearing because he is in contempt of court. *Hovey v. Elliott*, 167 U. S. 409; *Windsor v. McVeigh*, 93 id. 277; *McVeigh v. United States*, 11 Wall. 259; *Gordon v. Gordon*, 141 Ill. 160; *Meacham v. Bear Valley Irrigation*

Co. 145 Cal. 606; *Foley v. Foley*, 120 id. 33; *Greig v. Ware*, 25 Col. 184; *Trough v. Trough*, 59 W. Va. 464; *Pell v. Pell*, 50 Iowa, 521; *Haldine v. Eckford*, L. R. 7 Eq. 425.

It is argued on behalf of the defendants in error that the action of the court may be justified by "the undoubted right of the court to create a presumption of fact that the books, if produced, would present evidence against the plaintiff." The trouble with this argument is that there is no such right. The court administers the laws; it is the province of the legislature to make them. The legislature may prescribe rules of evidence and change them. (*People v. McBride*, 234 Ill. 146; *Waugh v. Glos*, 246 id. 604; *Pittsfield and Florence Plankroad Co. v. Harrison*, 16 id. 81.) In those States where the striking of a party's pleadings from the files and the entry of a judgment by default upon the failure of such party to comply with an order for the production of evidence have been sustained, such action has been authorized by an express statute. Such statutes, if within the power of the legislature, find their sanction, as stated by the Supreme Court of the United States in *Hammond Packing Co. v. Arkansas*, 212 U. S. 321, in "the undoubted right of the law-making power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." Our statute contains no provision for the striking of pleadings, the creation of a presumption, or the entry of judgment upon a failure to produce the evidence required by an order of court. The parties are left to the remedies existing in the absence of a statute.

The judgment is reversed and the cause remanded.

Reversed and remanded.

THE CITY OF CHICAGO, Appellee, vs. DAVID M. CUMMINGS,
Appellant.

Opinion filed June 20, 1911.

1. SPECIAL ASSESSMENTS—*a valid ordinance is the foundation of every special assessment.* The foundation of every special assessment is a valid ordinance specifically describing the nature, character and locality of the proposed improvement, and no valid assessment can be predicated upon an ordinance which omits from its terms essential features of the improvement.

2. SAME—*description should enable a property owner to know what the improvement is.* An ordinance for a special assessment must so describe the improvement that property owners may know what the improvement is, and, in case of a sidewalk ordinance, so that he may do the work himself if he desires to avail himself of the right given him for that purpose by the ordinance.

3. SAME—*sidewalk ordinance should provide for necessary retaining wall or embankment.* If the construction of a sidewalk in front of certain property at the grade required will put the walk nine feet above the surface of the property and require the construction of either a retaining wall or embankment to retain the fill, the ordinance should provide for such wall or embankment and specify its character, and if the ordinance makes no such provision it is defective and will not authorize judgment of confirmation against the property.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

WILLIAM J. DONLIN, for appellant.

GEORGE A. MASON, and WILLIAM T. HAPEMAN, (EDWARD J. BRUNDAGE, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for the confirmation of a special assessment sought to be levied under the provisions of the Local Improvement act for the purpose of constructing a sixteen-foot concrete sidewalk on each side of Ninety-second street between South Chicago avenue and Harbor

avenue, in the city of Chicago. The appellant, who was the owner of one hundred feet of unimproved property on the line of the improvement, appeared and filed objections to confirmation, which objections were overruled and the assessment confirmed, and an appeal has been prosecuted to this court.

The sidewalk was to occupy the space between the curb lines and the street lines, and the ordinance provided the sidewalk space should be graded by cutting down or filling up the surface of the ground to fourteen inches below grade, and that wherever filling was necessary it should be done with earth or other material equally as good for filling purposes, and upon the filling there was to be placed a layer of cinders, or other material equally as good, nine inches thick, and upon this should be laid a five-inch layer of concrete, the work to be done under the supervision of the board of local improvements. The evidence showed that the appellant's property was about nine feet below grade, and that in order to hold the filling in place it would be necessary to construct a retaining wall upon his lot line nine feet high, or to construct a berme or embankment nine feet high and twelve feet wide at the base, which berme or embankment would rest wholly upon appellant's property.

It is first contended that as the ordinance does not provide for the construction of the retaining wall or berme the ordinance is not sufficiently specific upon which to base a special assessment to pay for the construction of the improvement. We are of the opinion this objection is a valid one. At the foundation of every special assessment there must rest a valid ordinance and one that specifically describes the nature, character and locality of the proposed improvement, and no valid special assessment can be predicated upon an ordinance which omits from its terms essential features of the improvement. (*Washington Ice Co. v. City of Chicago*, 147 Ill. 327; *Title Guarantee and Trust*

Co. v. City of Chicago, 162 id. 505.) It is obvious that the construction of a retaining wall or berme nine feet high upon the lot line of appellant's property would be attended with much expense, and if a berme were constructed it would necessarily deprive the appellant of the use of a considerable portion of his property. If, however, it were held that the ordinance was sufficiently specific in the foregoing particular, then it would be necessary for the board of local improvements to determine what sort of a retaining wall or berme should be constructed in front of appellant's property. If a retaining wall were decided upon, it might be constructed of stone, concrete, brick or wood, and if a berme were constructed, earth, gravel, crushed stone or other similar material might be used, the cost of construction depending entirely upon the material used in building the berme. This would all rest in the discretion of the board of local improvements. In one part of the improvement a stone wall might be determined by the board to be necessary, while upon other parts the board might determine that brick, wood or earth would answer the purpose. The general rule is, that an ordinance must describe the improvement so that the property owner may know from its terms what he is to get when the improvement is completed and what sort of an improvement his property is being assessed to construct. We think the ordinance should have specified the character of the wall or berme to be constructed and the material to be used in its construction, and that the ordinance was defective in failing so to do.

The ordinance also provided the property owners whose property the sidewalk adjoins should have the right to construct the sidewalk in front of their property within forty days, "provided the work so to be done shall in all respects conform to the requirements of the ordinance." It is clear that the appellant could not avail himself of that right in this instance, as he could not know from the ordinance what would be a compliance with the terms of the ordi-

nance, as the character of the improvement rests, to a large extent, in the discretion of the board of local improvements.

We are of the opinion the trial court erred in confirming the special assessment as against the property of the appellant.

The judgment of the superior court will be reversed.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. AUSTIN CASADY, Plaintiff in Error.

Opinion filed June 20, 1911.

CRIMINAL LAW—when judgment sentencing prisoner under the Parole law is erroneous. One convicted, under section 53 of division 1 of the Criminal Code, of the crime of cruelty to a child, which is punishable by fine or imprisonment in the penitentiary not exceeding five years, there being no minimum term of imprisonment fixed, cannot lawfully be sentenced under the Parole law. (*People v. Hartsig*, 249 Ill. 348, followed.)

WRIT OF ERROR to the Circuit Court of Henry county;
the Hon. EMERY C. GRAVES, Judge, presiding.

LOUIS GREENBERG, for plaintiff in error.

W. H. STEAD, Attorney General, CHARLES E. STURTZ,
State's Attorney, and FRED H. HAND, for the People.

Per CURIAM: At the February term, 1909, of the Henry county circuit court six indictments were returned against the plaintiff in error charging him with cruelty to a child, under section 53 of division 1 of the Criminal Code. (Hurd's Stat. 1909, p. 759.) He entered a plea of guilty to each indictment, and thereupon the court sentenced him to imprisonment in the penitentiary "until discharged under due process of law, not to exceed the period of five years."

A writ of error has been sued out in each of the six cases, and as they all involve the same questions they have been consolidated here.

Said section 53 provides that any person who is guilty of acts therein designated "shall be fined not exceeding \$500 or imprisoned in the penitentiary not exceeding five years." Under the reasoning of this court in *People v. Hartsig*, 249 Ill. 348, plaintiff in error should have been sentenced under said section 53 and not under the Parole law. This is conceded by the State. The judgment in each of the cases is therefore erroneous and each must be reversed. The plaintiff in error has been confined two years in the penitentiary. In view of the circumstances of this case, the punishment already inflicted and the nature of the charge in the indictments, the causes will not be remanded.

Judgments reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. FRED T. WALKER, Plaintiff in Error.

Opinion filed June 20, 1911.

1. CRIMINAL LAW—*when it must be presumed that court advised defendant of effect of plea of guilty.* Where the bill of exceptions does not purport to show what the court said to the defendant at the time a plea of guilty was entered, but the record merely states that the defendant "was fully advised by the court of the effect of rendering said plea," it must be presumed, in support of such recital, that the court discharged its duty in that regard.

2. SAME—*court should permit plea of guilty to be withdrawn if entered under clear misapprehension.* In the exercise of its sound legal discretion the court may vacate a judgment on a plea of guilty and permit the plea to be withdrawn, and it should do so where it appears that the plea was entered unadvisedly or through misapprehension, in consequence of misrepresentation by counsel. (*Krolage v. People*, 224 Ill. 456, followed.)

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. MARCUS KAVANAGH, Judge, presiding.

A. L. GETTYS, for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and W. EDGAR SAMPSON, (FREDERICK BURNHAM, of counsel,) for the People.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Fred T. Walker has sued out a writ of error to the criminal court of Cook county to bring into review the record of his conviction in said court upon the charge of bigamy. The record shows that when the plaintiff in error was arraigned upon said charge he entered a plea of not guilty. Afterwards, on January 31, 1911, he withdrew his plea of not guilty and entered a plea of guilty. The judgment of the court contains the following recital and order in regard to the plea of guilty: "And said defendant, by leave of court, now here withdraws his plea of not guilty, heretofore rendered to the indictment in this case, and for a plea thereto says that he is guilty, in manner and form, as charged therein, and he, being fully advised by the court of the effect in rendering said plea, he still persists therein, and the court orders said plea to be accepted and entered of record against the said defendant." On the fourth day of February, following the day that the judgment was entered, plaintiff in error entered a motion to vacate the sentence and judgment and for leave to withdraw his plea of guilty, which motion was overruled, to which plaintiff in error preserved an exception. A motion for a new trial was then made and overruled. The question presented for the consideration of this court is whether the trial court erred in denying the motion to vacate the judgment and to permit the plaintiff in error to withdraw his plea of guilty.

Upon the hearing of the motion to vacate in the criminal court plaintiff in error submitted three affidavits,—one made by himself, one by his mother and one by his grandmother. The affidavit of the plaintiff in error is as fol-

lows: "That he was arrested some time in November last on two charges,—one for adultery and one for bigamy; that he engaged a lawyer by the name of William Schreider; that the said lawyer took charge of the case and was paid a retainer in said case; that he relied entirely upon the advice of counsel and did everything that he told him to do; that the said lawyer said to this affiant that he had seen the State's attorney and talked with him, and that he told this affiant that if he would plead guilty to adultery the bigamy charge would be dropped. Thereupon, acting upon the advice of counsel, he did plead guilty to adultery before his honor Judge Going, when, as a matter of fact, he is now advised by counsel that he was not guilty of the charge; that the plea was entered solely for the purpose of carrying out the promise of his attorney, and, as the attorney told him, the promise of the State's attorney that the bigamy charge would be dropped. The said attorney even went so far as to say that the said attorney had talked with him about the case, and had agreed that he should get a divorce from the said Annie Meyers if there was any marriage at all contracted. This affiant further states that there was some kind of a ceremony performed, but he does not believe that it was a valid ceremony. At any rate, this affiant never cohabited with the said Annie Meyers and never lived with her as her husband; that at the time the ceremony took place the said Annie Meyers insisted upon it being performed, and threatened him that if he did not perform the ceremony, by implication and other conduct, that she would have him arrested, because she said that she was pregnant with child; that the said ceremony took place without lawful authority. This affiant further says that this is the first time he was ever arrested; that he is unaccustomed to court and court practices; that he did not want to do anything except as he was advised by counsel; that while he remained in jail, from November until the day of his trial, on the said bigamy charge, which occurred

on January 31, 1911, he was very seldom visited in jail by his attorney and only saw him about three or four times; that the said attorney said that he had everything arranged and that everything would be all right and the bigamy case would be dropped and stricken from the docket. Thereafter, on the day of the trial, the said attorney came rushing into the prisoner's room and said, 'You had better plead guilty; if you will plead guilty you will soon get out of it, and after you serve your sentence on the adultery conviction then this case will be dropped; then you will be entirely out of your trouble.' This affiant further says that when the case was called before your honor he did act upon the advice of his counsel, but he was so terrified and was so weak that he was almost unconscious of what was going on before him; that while the court said to him that he had the authority to send him to the penitentiary, still he did not understand the court would do it or the length of time he would or could send him there, and he did not realize the import of the court's declaration, as he was under the impression that the secret arrangement with the State's attorney, as he was informed by his attorney, would supplement or overrule the sentence of the court; that he believes that he has a good defense on the merits of the case, and if it had not been for his attorney acting as he did and in collusion with other people he would have a trial by the jury, and that when he pleaded guilty to bigamy he did it, not with the understanding he would be sent to the penitentiary, but that he would be free ultimately and allowed his liberty; that his counsel did not advise him that there was nothing else the court could do on a plea of guilty but to sentence him to the penitentiary, but, on the other hand, gave him to understand that the court had authority to save him from the penitentiary on a plea of guilty; that he did not fully and fairly understand the consequences of such plea and the waiver of rights thereunder. This affiant further says that he is the defendant

in this entitled cause and that he makes the foregoing affidavit for himself, and also says that the court did not disclose to him that the jury could do no more to him if it found adversely to him than the court would have to do if he plead guilty to the said charge of bigamy."

The affidavit of plaintiff in error's mother, Mrs. Helfrich, states that she employed Schreider to defend her son and paid him a large retainer fee, and that said Schreider told affiant several times that he had everything arranged so that by pleading guilty to the charge of adultery the charge of bigamy was to be dropped. She states that the plaintiff in error is twenty-two years of age; that he was married when only about nineteen years of age, and that he had never had anything to do with court proceedings before the present charges were brought against him.

Mrs. Hayes, the grandmother, testifies that she was in court at the time the plaintiff in error entered his plea of guilty; that she had been holding the plaintiff in error in her arms just before he was called to the bar of the court and that he was so terrified and bewildered that he did not know what he was doing, and that she could feel that when he was in her arms he was shaking like a man with palsy; that he could not say anything and was not able to articulate. She testifies that she asked his attorney why he did not have a jury trial, and he said that it was for Walker's interest.

There was no counter-affidavit submitted, and the foregoing statement is, in substance, the evidence introduced on the hearing of the motion.

Plaintiff in error insists that the record does not show that the court fully explained to the accused the consequence of entering a plea of guilty before receiving such plea and rendering judgment thereon. The bill of exceptions does not purport to show what was said to the plaintiff in error by the court at the time the plea of guilty was entered. The record simply shows that plaintiff in error

was "fully advised by the court of the effect of rendering said plea." It must be presumed, in support of this recital, that the court discharged its duty. (*Marx v. People*, 204 Ill. 248.) But independent, entirely, of this question, it was a matter within the sound legal discretion of the judge to vacate the judgment and permit the plaintiff in error to withdraw his plea of guilty and allow him to submit his case to a jury if it appeared that such plea had been entered unadvisedly or through a misapprehension, in consequence of the misrepresentation of his counsel. If, as he testifies in his affidavit, his attorney had assured him that he had arranged with the State's attorney that the bigamy charge was to be dropped, it is not unreasonable that the plaintiff in error would follow the advice of his counsel and enter a plea of guilty, expecting and believing that in some way he would not be imprisoned on said charge. In the case of *Krolage v. People*, 224 Ill. 456, this court, on page 460, said: "The withdrawal of the plea of guilty should not be denied in any case where it is evident that the ends of justice will be subserved by permitting the plea of not guilty in its stead. The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty." The case from which the quotation above is made is in some respects very similar to the one at bar, and the conviction was reversed because the court refused to permit the withdrawal of a plea of guilty. In our opinion there was an abuse of the discretion vested in the trial court in refusing to permit plaintiff in error to withdraw his plea of guilty.

The judgment of the criminal court of Cook county is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

JULIA A. CLAYTON, Admx., Defendant in Error, *vs.* WILLIAM R. CLAYTON, Plaintiff in Error.

Opinion filed June 20, 1911.

1. JURISDICTION—*the probate court may determine equities on petition to sell land for debts.* Under section 101 of the Administration act the county or probate court, on petition by an administratrix to sell land to pay debts, may determine the question whether a quit-claim deed to the widow from one of the heirs is valid as against an attaching creditor of the heir.

2. SAME—*a freehold is involved where real estate attached is claimed by a third person.* Where the issue, on petition to sell land to pay debts of the estate, is whether a quit-claim deed to the widow from an heir, conveying part of the land, is valid as against an attachment levied by a creditor of the heir on his interest in such land, a freehold is involved and the Supreme Court has direct appellate jurisdiction.

3. DEBTOR AND CREDITOR—*creditor attacking deed as in fraud of his rights must prove that he is a creditor.* One who answers a petition by an administratrix to sell land to pay debts and seeks to have a quit-claim deed by an heir to the widow set aside as in fraud of his rights as a creditor, must prove that he was, in fact, a creditor of the grantor at the time the quit-claim deed was made.

4. SAME—*when attachment affidavit and papers do not prove that plaintiff is a creditor.* As against a person not a party to the suit, an attachment affidavit and other papers and proceedings in an attachment suit do not prove the existence of an indebtedness or that the plaintiff in the attachment suit was a creditor of the defendant, and unless the fact of the indebtedness is otherwise proved the attachment plaintiff has no standing as a creditor to have a deed to such third person from the attachment defendant set aside.

5. SAME—*when decree refusing to set aside deed is correct.* A decree of the probate court refusing to set aside a quit-claim deed to the widow from an heir as in fraud of the rights of an attaching creditor of the heir is correct, where there is no proof of any fraudulent intent, either as to grantor or grantee, nor that the grantor was insolvent when he made the deed, which was based upon ample consideration.

DUNN, CARTWRIGHT and HAND, JJ., dissenting.

WRIT OF ERROR to the Probate Court of LaSalle county;
the Hon. A. T. LARDIN, Judge, presiding.

I. I. HANNA, for plaintiff in error.

S. P. HALL, and BUTTERS & ARMSTRONG, for defendant in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Julia A. Clayton, as administratrix of the estate of her deceased husband, John S. Clayton, filed a petition in the probate court of LaSalle county for the purpose of obtaining an order to sell certain real estate of which her husband died seized, to pay the debts of the estate. The petition recites that John S. Clayton, who in his lifetime resided at Utica, died May 14, 1909, leaving the petitioner, his widow, and Grant F. Clayton, Charles S. Clayton and Glennie C. Piercy, his children and only heirs-at-law; that decedent owned, at the time of his death, a house and lot in Utica and one hundred and ninety-eight acres of land in LaSalle county; that the debts of the estate amount to \$7833.15, exclusive of the expense of administration, and the personal assets amount to \$3046.50. The petition alleges that since the death of John S. Clayton, on May 19, 1909, Grant F. Clayton and Sarah Clayton, his wife, by a quit-claim deed, for a valuable consideration, conveyed all of their interest in said real estate to the petitioner, Julia A. Clayton. William R. Clayton, a brother of the decedent and a party defendant to the petition, filed an answer, in which he states that he is a creditor of Grant F. Clayton, and that he had sued out a writ of attachment from the circuit court of LaSalle county against said Grant F. Clayton for \$4619.30, and caused the same to be levied upon all interest of said Grant F. Clayton in the real estate described in the said petition, June 15, 1910. In his answer William R. Clayton charges that the quit-claim deed from Grant F. Clayton and wife to Julia A. Clayton, the mother of Grant F. Clayton, was made without any valuable consideration, for the purpose of hindering and delaying the

creditors of said Grant F. Clayton in the collection of their debts, and that said deed was therefore fraudulent and void as to the creditors of the grantor, and prayed that the title to a one-third interest in the said real estate, subject to the debts of the decedent and the widow's homestead and dower, might be found to be in said Grant F. Clayton, and that the attachment writ be held to be a valid lien on the interest of said Grant F. Clayton. The only controversy before the probate court was the question raised by the answer of William R. Clayton in regard to the validity of the quit-claim deed of Grant F. Clayton to his mother. This question was tried by the probate court, and resulted in a decree sustaining the validity of the quit-claim deed and adjudging the title to the interest of Grant F. Clayton to be in Julia A. Clayton, subject to the debts of her husband's estate. William R. Clayton has sued out a writ of error to bring up the record of the probate court for review, and his assignment of error questions the correctness of the decree in so far as it finds that the quit-claim deed was a valid conveyance of the interest of Grant F. Clayton and that said interest was not subject to the lien of the attachment writ.

Before coming to a consideration of the merits of this case two preliminary questions require a brief notice.

Defendant in error suggests that the issue raised by the answer of William R. Clayton was not within the jurisdiction of the probate court in a proceeding to sell real estate to pay the debts of a deceased owner. Section 101 of our chapter on administration, as amended in 1887, has extended the jurisdiction in proceedings of this character, so that the court in which such proceeding is instituted has jurisdiction to direct the sale of real estate disencumbered of all mortgage, judgment or other money liens that are due and direct their payment out of the proceeds of the sale, and may also settle and adjust all equities and all questions of priority between all parties interested therein,

and may investigate and determine all questions of conflicting titles arising between any of the parties to such proceedings, and may remove clouds from the title of any real estate sought to be sold and invest the purchaser with an indefeasible title to the premises. Said section provides that the practice in such cases shall be the same as in courts of chancery, and evidently the legislature has attempted to confer general chancery powers upon the county and probate courts in all proceedings of this character. The controversy here as to the validity of the quit-claim deed and the lien of attachment was within the jurisdiction of the probate court in this proceeding.

It is further suggested by defendant in error that this court is without jurisdiction of this case for the reason that a freehold is not involved in that part of the decree upon which error is assigned. Ordinarily a suit by attachment, where real estate of the debtor is sought to be subjected to a lien, does not involve a freehold, but where real estate has been levied upon by an attachment and the real estate attached is claimed by an intervening third party adversely to the defendant in the attachment suit, the title is directly put in issue and the case then necessarily involves a freehold. (*Ducker v. Wear & Boogher Dry Goods Co.* 145 Ill. 653; *Alsdurf v. Williams*, 196 id. 244.) The issue involved in this proceeding and decided by the court below is one of title between an attaching creditor and a person, other than the defendant in the attachment, who claims the title to the attached premises. A freehold being thus involved, the writ of error is properly sued out of this court.

Upon the merits of this case the plaintiff in error contends that the decree below is not supported by the evidence. The evidence, which is not conflicting, shows the following facts: Grant F. Clayton left the State of Illinois about fourteen years before his father's death and located in the State of California. He never returned to this State, either before or after his father's death. On May 10, 1908,

he wrote his mother a letter, enclosing two notes signed by himself and payable to Julia A. Clayton, one for \$1274.96 and the other for \$1698.51, and both payable on demand. The letter explains that the notes cover several loans of money and the interest thereon up to the date of the notes, which made a total of \$2973.47. These notes were delivered to defendant in error about one year before the death of her husband. On October 15, 1908, Grant F. Clayton again wrote his mother a letter, in which he said: "I wonder if it would be possible for me to secure you in some way by a quit-claim deed to you for anything I might have fall to me from father's estate in Illinois. He is not well and might pass away any time, or the same might happen to me. Let me hear from you. I think it better not to say much to father about this, as such things always irritate him." Julia A. Clayton testified that she purchased the interest of Grant F. Clayton in the estate of his father in LaSalle county on May 19, 1909, for the sum of \$6000, subject to the debts of the estate and the cost of administration and also subject to the widow's homestead and dower. She testifies that at the date of the quit-claim deed her son owed her \$3204.83, and that by his direction she paid debts for him, as follows: John Carlin, \$1050; LaSalle State Bank, \$450; Duncan Bros. & Carlin, \$225; Wheeler & Leland, \$500; Fitzgerald, \$40; Haynes, \$55; cash to Grant, \$500,—making a total of \$6024.83. In addition to the real estate in LaSalle county owned by John S. Clayton at the time of his death, the inventory filed by his administratrix shows that he also owned real estate in California valued at \$29,700, and a lot in the city of Lake Charles, Louisiana, valued at \$700, none of which was included in the quit-claim deed to defendant in error or had otherwise been disposed of by Grant F. Clayton at that time. The only evidence offered by the plaintiff in error was an affidavit for an attachment, subscribed and sworn to by him on June 13, 1910, in which it is stated that Grant

F. Clayton was indebted to plaintiff in error in the sum of \$4619, due May 19, 1909, and that said Grant F. Clayton was a non-resident of the State of Illinois; a writ of attachment issued on said affidavit out of the circuit court of LaSalle county, showing a levy, by virtue of said writ, on the interest of Grant F. Clayton in the premises in question; a certificate of levy filed by the sheriff June 15, 1910, and an order of the circuit court showing that Grant F. Clayton had been defaulted. There was no proof of personal service on the defendant in the attachment proceedings, but the default order contains a recital that the defendant had been duly notified by publication. Upon the foregoing evidence the probate court rendered the decree of which the plaintiff in error complains.

Disregarding the form and looking at the substance of the controversy between the parties to this record, plaintiff in error occupies the situation of an attaching creditor who is seeking to have the conveyance made by the defendant in the attachment set aside because said conveyance was made for the purpose of hindering and delaying the creditors of the grantor in the collection of their debts. In order to give plaintiff in error any standing in any court to have the conveyance set aside, it was necessary that he should prove that he was, in fact, a creditor of the grantor in the deed. There is no evidence whatever in this record which even tends to prove, as against the defendant in error, that plaintiff in error was a creditor of Grant F. Clayton at the time the quit-claim deed was made or at any time. Plaintiff in error relies upon his affidavit, and other papers and proceedings in the attachment case, as establishing all of the elements of his case against defendant in error. Mrs. Clayton was not a party to that proceeding. Being a stranger to the case, no admission or statement therein, either of record or otherwise, by the parties, would be binding upon her. *Juilliard & Co. v. May*, 130 Ill. 87; *Springer v. Bigford*, 160 id. 495; *Yost Manf. Co. v. Alton*, 168 id. 564.

In the case last above cited the situation was similar to the one here presented. The attaching creditor there, as here, relied on the affidavit and other papers to establish his indebtedness on an issue being tried between the attaching creditor and a third party who claimed the property by interplea. There being no other evidence that the plaintiff in the attachment was a creditor of the defendant in that proceeding the trial court directed a verdict for the interpleader. This court, in passing on that question, (p. 566,) said: "There was evidence produced upon the trial which, uncontradicted, showed the appellee to be the owner of the property in question. The appellant introduced no evidence that it was a creditor of the Climax Cycle Company, except the affidavit, bond and other papers in the attachment suit, as before stated. These were no evidence of any indebtedness due the appellant. Without evidence of such an indebtedness the appellant could not raise any question of fraud, it not being shown to be a creditor. (*Springer v. Bigford*, 160 Ill. 495.) Without evidence, therefore, that appellant was a creditor, and it not being in a position to raise any question of fraud, it was not error in the trial court to instruct the jury, at the close of all the evidence, to find for appellee."

The decree of the court below might well be sustained because plaintiff in error wholly failed to prove that he was a creditor of Grant F. Clayton at the time the deed in question was made, but there are other matters in respect to which the plaintiff in error failed to establish his contention. There is no proof that Grant F. Clayton was insolvent at the time the deed was made. The inventory, as well as the evidence of the defendant in error, shows that John S. Clayton owned, at the time of his death, unencumbered real estate outside of Illinois worth about \$30,000. Grant F. Clayton inherited one-third of this property, subject to the rights of his mother, as widow. The deed in question was made five days after his father's death. This evidence

tends to show that Grant F. Clayton was not insolvent at the time the deed in question was made to his mother. Again, there is no evidence in this record that proves, or tends to prove, that the quit-claim deed was made by Grant F. Clayton with the fraudulent intent charged, and certainly none that the defendant in error participated in or had any knowledge of such fraudulent intent on the part of the grantor, if such intent, in fact, existed. There is no dispute about the amount or adequacy of the consideration. The evidence is undisputed that the defendant in error paid \$6024.83 for the interest of Grant F. Clayton in the LaSalle county land and that she was to take it subject to her homestead and dower rights and the debts of her husband's estate. The evidence shows that this was the full value of his interest. The defendant in error testifies that she knew nothing about Grant's indebtedness to the plaintiff in error at the time she bought his interest. She says that she had understood that Grant was owing the plaintiff in error some amount fourteen years before, when he went to California, but she had heard nothing about such debt since that time.

Under the evidence in this record the decree of the probate court sustaining the deed and ordering the sale of real estate free and clear of the attachment lien was correct, and the same will be affirmed.

Decree affirmed.

DUNN, CARTWRIGHT and HAND, JJ., dissenting:

Both the petitioner and the plaintiff in error, William R. Clayton, claimed through Grant F. Clayton, one of the heirs of the decedent, the former as the grantee in a conveyance by the said Grant F. Clayton, the latter as a creditor of said Grant F. Clayton by reason of the subsequent levy of a writ of attachment. The only question in the case was as to the existence of a lien in favor of the plaintiff in error on the interest Grant F. Clayton inherited. The decree found against the plaintiff in error and that there was no such lien. If the decree had been in his favor it

could have found no more than that a lien existed in favor of the plaintiff in error for a certain sum of money, and upon payment of that amount the interest inherited by Grant F. Clayton would have been relieved of the lien. No freehold was involved. The only question tried, or that could have been tried, was the good faith of the conveyance to the petitioner, and the only question adjudicated, or that could have been adjudicated, was the existence of a lien in favor of the plaintiff in error. We have many times held that a suit to establish a lien does not involve a freehold, whether it seeks to foreclose a mortgage or mechanic's lien, to redeem from a mortgage, to have an absolute conveyance declared a mortgage, or to set aside an absolute deed made in fraud of creditors. (*Beach v. Peabody*, 188 Ill. 75; *Pearson Lumber Co. v. Brady*, 159 id. 378; *Ryan v. Sanford*, 133 id. 291; *Adamski v. Wiecezorek*, 181 id. 361; *First Nat. Bank v. Vest*, 187 id. 389.) The relief sought here is to declare the conveyance to the petitioner fraudulent and subject her property to the attachment lien. The cases of *Ducker v. Wear & Boogher Dry Goods Co.* 145 Ill. 653, and *Alsdurf v. Williams*, 196 id. 244, cited in the majority opinion, do not sustain the jurisdiction of this court. Those were attachment cases in which a third person intervened denying the title of the defendant and claiming the land adversely. The title was thus put directly in issue by the pleadings. Under the statute the question tried was not the existence of a lien by virtue of the attachment, but the ownership of the property. In such case the statute directs a jury to be empaneled to inquire into the right of property. That is the sole issue,—the title. Neither the plaintiff's debt nor his lien is in issue and the judgment of the court does not establish or deny any lien. The judgment is either for or against the claimant absolutely, and establishes the title. In our judgment this appeal should be transferred to the Appellate Court.

WILLIAM M. HOYT, Appellant, vs. ROBERT G. McLAUGHLIN et al. Appellees.

Opinion filed June 20, 1911.

1. NUISANCES—*when public nuisance cannot be abated at suit of private individual.* A public nuisance cannot be abated at the suit of a private person but only in an action by or in the name of the People, unless the nuisance causes such person a special and particular injury distinct from that suffered by him in common with the public at large.

2. SAME—*what is meant by injury to the public.* Injury to the public, as that term is used with reference to the abating of nuisances, means such an injury as hinders or excludes all persons alike from the enjoyment of a common right; but the question whether a person has suffered special injury different from the public injury is not determined by whether he alone has suffered injury or whether others in the vicinity have also been injured.

3. SAME—*what does not affect right of person to maintain bill to abate nuisance.* If an individual has suffered special damage to his property from a public nuisance his right to maintain a bill to enjoin its continuance is not affected by the mere fact that the property of others in the vicinity is injured from the same cause.

4. SAME—*what allegations show special damage from conducting unlicensed dram-shop.* A bill seeking to enjoin the conducting of an unlicensed dram-shop (which the statute declares to be a public nuisance) makes a case of special injury which alleges that the rental value of complainant's building, which is used for stores and flats, is greatly depreciated by the dram-shop being conducted in the same block, and that complainant is thereby compelled to rent to a class of tenants containing a greater per cent of persons who fail to pay rent than the class he could get if the dram-shop were not conducted there.

5. DRAM-SHOPS—*when license to keep a dram-shop is invalid.* A dram-shop license is invalid which is issued without complying with the terms of an ordinance requiring the application to be signed by a specified proportion of the property owners within the territory fixed by the ordinance.

6. SAME—*property owners on both streets must sign petition where dram-shop has a corner entrance.* Where the main entrance of a dram-shop located on a corner lot is diagonally across the corner of the building, so that it is as much on one street as the other, the signatures of property owners on both streets must be

obtained under an ordinance requiring the signatures of a specified portion of the property owners on each side of the street in the block where the dram-shop has its main entrance.

7. SAME—one person cannot operate dram-shop under another person's license. Neither under paragraph 4 of the Dram-shop act nor section 1332 of the ordinances of the city of Chicago is it lawful for one person to own, maintain and conduct a dram-shop under a license issued to and in the name of another person.

8. SAME—the Chicago ordinance dividing license year into two periods is not unlawful. Section 1340 of the Chicago ordinances, which divides the license year into two periods of six months each and permits licenses to be issued for each period for \$500 license fee in advance, but which authorizes the issuing of a license for the full year for \$1000 in advance, with provisions for issuing licenses for unexpired portions of the year or periods, is not in conflict with paragraph 3 of the Dram-shop statute.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding.

EDWIN BEBB, for appellant.

WINSTON, PAYNE, STRAWN & SHAW, (ARTHUR C. MARRIOTT, of counsel,) for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

The appellant, William M. Hoyt, filed a bill in the superior court of Cook county, on the chancery side, for an injunction against Herman P. Grube and Robert G. McLaughlin, the appellees, the latter of whom was running a dram-shop located on the corner of Fifty-fifth street and Lake avenue, in the city of Chicago. The bill alleged that the dram-shop was owned and conducted by McLaughlin under a license issued to Grube; that the ordinance under which said license was issued was void; that the petition filed with the application for license did not contain a sufficient number of signers, as required by the ordinance, and that said dram-shop was operated and maintained by said McLaughlin illegally and without any warrant of law. The

bill further alleged that appellant is the owner and in possession of a four-story brick building located at 5528 and 5530 Lake avenue, which building contains on the first floor two store rooms leased and occupied for merchandise purposes, and on the second, third and fourth floors are eighteen flats or apartments occupied as dwellings by tenants, for which a certain rent is paid to appellant. The bill further alleged that appellant's property is located in the same block as the dram-shop and about two hundred feet distant therefrom; that the operation of said dram-shop denies "to the complainant and his said tenants the peace and quiet to which they are entitled, and said saloon, and its patrons attracted thereto, are a constant source of injury and damage to the said property of complainant used for dwellings and for other purposes, as aforesaid, and depreciate the value of complainant's said property; that by reason of the nuisance of the said saloon and by reason of the inherent nature of the business said complainant cannot rent his said apartments or flats as dwellings and stores advantageously, and is forced to rent the said dwellings at a greatly reduced rent from that which he otherwise could have obtained, to the great loss of the complainant; that the class of tenants who will rent such dwellings and stores while said unlawful saloon or dram-shop is operated embrace a larger number than there otherwise would be of persons who are unable to pay their rent when due and often fail wholly to pay their rent, to the great loss of complainant." The bill alleged that the damage and injury to appellant occasioned by maintaining and operating said dram-shop were great and irreparable, and that appellant would continue to suffer such damage and injury unless appellees be enjoined from further operating, conducting and maintaining said dram-shop. A general demurrer was filed to the bill, which was sustained by the court and the bill dismissed for want of equity. The court having certified that the validity of a municipal ordinance of the city of

Chicago was involved and that the public interest required that the question should be passed upon by this court, an appeal was prayed and allowed and the case has been brought here for review.

The bill alleges that the property described is in what was the village of Hyde Park before its annexation to the city of Chicago; that prior to said annexation the village adopted an ordinance which, in part, is as follows: "Any person who shall desire to obtain a license to keep a saloon or dram-shop shall, in addition to the requirements now provided by ordinance, present his application, in writing, to the village comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram-shop is to be kept, which application shall be signed by a majority of the property owners, according to frontage, on both sides of the street in the block in which such dram-shop is to be kept, and shall also be signed by a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance," and which said ordinance is now in full force and effect in that part of the city of Chicago which was formerly Hyde Park. The bill alleges that said ordinance was not complied with by securing the signatures to the application for license of a majority of the property owners, according to frontage, on both sides of the street in the block in which the dram-shop is located, nor by securing to the application the signatures of a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block upon which the dram-shop has its main entrance. It is alleged that at the time the license was issued the total number of *bona fide* householders, persons or firms living or doing business on the east side of Lake avenue in the block in which the dram-shop is located was nine, but that only two of this number had

signed the application. The entrance to the dram-shop is in the corner of the building on Lake avenue and Fifty-fifth street, and is alleged to be as much on one street as the other. The bill charges it was the duty of the applicant for license to secure the signatures of a majority of the *bona fide* householders and persons or firms living in or doing business on each side of both Lake avenue and Fifty-fifth street because the main entrance was on both of said streets, and it is alleged the application was not signed by any householder, person or firm living or doing business on either side of Fifty-fifth street. The bill sets out a number of ordinances of the city of Chicago relating to the subject of dram-shops, among them section 1340, which divides the license year into two periods of six months each, and authorizes a license for either period upon the payment of the fee in advance for the period. This ordinance, it is alleged, is in conflict with the Dram-shop act and is invalid.

While the trial court certified that the validity of an ordinance of the city of Chicago is involved and the public interest required the appeal to be prosecuted to this court, we have not been favored by counsel for appellees with any reference to or discussion of the validity of any ordinance. The grounds relied upon by appellees to sustain the decree of the superior court are, that the bill does not make a case showing special damage to appellant different from that suffered by the public at large, and in the absence of such showing it is claimed the nuisance could only be abated in an action by or in the name of the People. It is also insisted that the validity of a city ordinance cannot be raised in a court of equity by bill for an injunction.

An unlicensed dram-shop or saloon is declared by law to be a nuisance. (Hurd's Stat. 1909, chap. 43, par. 7.) Can such a nuisance be abated at the suit of a private person? The answer to this question depends upon whether an individual has suffered special damage different from that suffered by him in common with the public. The rule

is well settled by the decisions of this and other States that a public nuisance will not be enjoined at the suit of a private person unless the nuisance causes such person a special and particular injury distinct from that suffered by him in common with the public at large. In cases where no private or special injury is caused to an individual an action to abate the nuisance must be instituted by or in the name of the public. But a public nuisance may also be a private nuisance, (Wood on Nuisances, sec. 674,) as where the property of an individual is injured in a manner special to him and different from the injury to the public. An injury to the public, in the sense here used, is such an injury as excludes or hinders all alike in the enjoyment of a common right. The question whether a private person has suffered such special injury or damage is not to be determined by whether he, alone, has suffered damage or whether others in the same vicinity have been injured also. If an individual has suffered special damage to his property from the nuisance, his right to maintain a bill to enjoin it is not affected by the fact that the property of others has been injured by the same cause. (*Wylie v. Elwood*, 134 Ill. 281.) This question has been the subject of frequent adjudication, and, according to the great weight of authority, if the allegations of the bill here make a case against appellees of conducting a dram-shop without a license, the special damage alleged is sufficient to authorize maintaining the bill. In *Wesson v. Washburn Iron Co.* 95 Mass. 95, the court said: "The real distinction would seem to be this: That when the wrongful act is, of itself, a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health or creating personal inconvenience and annoyance for which an action might be maintained in favor

of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." Other cases in point and sustaining the appellant's right to maintain his action are: *Crawford v. Tyrell*, 128 N. Y. 34; 28 N. E. Rep. 514; *Weakley v. Page*, 102 Tenn. 178; 46 L. R. A. 552; *Kissel v. Lewis*, 156 Ind. 233; 59 N. E. Rep. 478; *Hamilton v. Whittedge*, 11 Md. 128; 69 Am. Dec. 184; *Haggard v. Stehlin*, 137 Ind. 43; 22 L. R. A. 577; *Detroit Realty Co. v. Oppenheim*, 156 Mich. 385; 21 L. R. A. (N. S.) 585; *Yolo County v. Sacramento*, 36 Cal. 193; *Walker v. Shepardonson*, 2 Wis. 384; 60 Am. Dec. 423.

The ordinance prescribing the requirements of the application for a dram-shop license, with reference to the signatures of property owners, was adopted by the former village of Hyde Park, but it has continued in force in that territory since the annexation of the village of Hyde Park to the city of Chicago and has been frequently before this court. *People v. Harrison*, 185 Ill. 307; *Harrison v. People*, 195 id. 466; *People v. Griesbach*, 211 id. 35; *Theurer v. People*, 211 id. 296; *People v. Heidelberg Garden Co.* 233 id. 290.

The bill alleges that the application by appellee Grube for the license was not signed, as the ordinance required, by a majority of the property owners, according to frontage, on both sides of the street in the block where the dram-shop was to be kept, and was not signed by a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block upon which the dram-shop has its main entrance; that there were nine *bona fide* householders and persons or firms living in or doing business on the east side of Lake avenue,—a street in the block upon which said dram-shop had its main entrance when the pretended license was issued,—but only two of said number signed the application.

By reason of these matters the bill alleges the license issued was void. That a license issued without compliance with the ordinance requiring the application to be signed by the proportion of the property owners specified is invalid and void was held in *People v. Griesbach, supra, Martens v. People*, 186 Ill. 314, and *Theurer v. People, supra*. On this ground we think the allegations of the bill made a case against appellees of running a dram-shop without a license, and the demurrer admitted the truth of these allegations.

It is also alleged in the bill that the dram-shop is located on the corner of Lake avenue and Fifty-fifth street; that the main entrance is diagonally across the corner of the building and is as convenient from Fifty-fifth street as from Lake avenue,—in fact, is as much on one street as the other,—but no signatures of householders, persons or firms doing business on Fifty-fifth street were obtained, and it is claimed in such case it was required that the application be signed by the requisite number on Fifty-fifth street. We are of opinion this is a proper construction of the ordinance. It is to be assumed that there were special reasons for requiring the applicant for a license to secure the signatures to his application of a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block upon which the dram-shop was to have its main entrance. According to the allegations of the bill the main entrance was on two streets, or, at least, it was no more on Lake avenue than it was on Fifty-fifth street. Where such an entrance is adopted it is our opinion the ordinance would not be complied with by procuring signatures only of persons on Lake avenue.

The bill further alleges the license was secured by and issued to appellee Grube but that the dram-shop is now owned, maintained and operated by appellee McLaughlin; that McLaughlin is lessee of the building and has had issued to him a United States government tax receipt au-

thorizing him to sell intoxicating liquors; that the said McLaughlin purchases in his own name the liquors sold in said dram-shop and advertises himself to be the owner of said dram-shop, and that this is all done upon the pretended authority of the license issued to the appellee Grube. Paragraph 4 of the Dram-shop act provides a dram-shop license shall not be transferable. Section 1332 of the ordinances of the city of Chicago, which is made part of the bill, is as follows: "No license granted under this ordinance shall be assigned or transferred except as hereinafter provided, nor shall any such license authorize any person to do business or act under it but the person named thereon. Any person to whom any license shall have been issued may, with the permission of the mayor, assign and transfer the same to any other person, and the person to whom such license is issued, or the assignee of such license, shall surrender such assigned license and have a new license issued for the unexpired term of the old license, authorizing the assignee or transferee of such license to carry on the same business or occupation at such place as may be named in such new license: *Provided*, that in all cases the person obtaining such new license shall give a bond, with sureties, which shall conform, as near as may be, to the bond upon which such surrendered license was issued: *Provided further*, that nothing herein contained shall be held to authorize the assignment or transfer of saloon or dram-shop licenses. Such licenses shall be non-assignable and not transferable." It would seem too plain for debate that McLaughlin could not own, maintain and conduct a dram-shop under a license issued to and in the name of another man.

The validity of the ordinance relating to the signatures of property owners in the block, and householders, persons or firms living in or doing business on each side of the street where the dram-shop has its main entrance, is not questioned in this suit by either party, and we are of opinion that whether the ordinance which is attacked by ap-

pellant is valid or invalid, the allegations of the bill were sufficient to require an answer. The decree merely sustains the general demurrer of appellees to the bill and dismisses it for want of equity. The chancellor certified that the validity of an ordinance is involved and that the public interest required the appeal to be direct to this court.

The bill makes ordinance 1340 of the city of Chicago a part thereof and alleges that it is in conflict with paragraph 3 of chapter 43. (Hurd's Stat. 1909, p. 931.) Section 1340 of the ordinance divides the license year into two periods. The first period is from May 1 to October 31 and the second period from November 1 to April 30. It authorizes dram-shop licenses to be issued for the full license year or the unexpired portion thereof, or for any period of the unexpired portion thereof. The license fee of \$1000 is made payable in advance for the full year, or \$500 in advance for each period. If a license is issued for the unexpired portion of a year or for the unexpired portion of any period, the fee to be paid shall bear the same ratio to the sum required for the whole year that the number of days in such unexpired portion bears to the whole number of days in the year. One of the errors assigned is that the court erred in holding this ordinance valid. The bill alleges the license was issued to the appellee Grube by periods, in accordance with the provisions of said ordinance, and the fee for each period was paid in advance. Paragraph 3, which appellant claims the ordinance is in conflict with, reads: "That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this State, to grant a license for the keeping of a dram-shop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars (\$500) per annum." We do not think the ordinance is in conflict with the statute, but for the reasons

given, the bill stated a cause of action and the court erred in sustaining the demurrer to and dismissing it.

The decree is reversed and the cause remanded to the superior court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

NETTIE STICKEL, Appellee, vs. THE RIVERVIEW SHARPSHOOTERS PARK COMPANY, Appellant.

Opinion filed June 20, 1911.

1. AMUSEMENT PARKS—the proprietor must see that devices of concessioners are reasonably safe. Where space in an amusement park is granted for conducting attractions for the amusement of the public, for witnessing which an admission fee is charged by the concessioner and divided with the owner, there is such unanimity of authority between the proprietor and concessioner that the proprietor assumes an obligation that the devices and attractions shall be reasonably safe for the purposes for which the public is invited to use them.

2. SAME—question whether it was negligence to maintain chute as only exit from building is for the jury. Whether it was negligence to construct and maintain a metal chute as the only means of exit from a building used as an amusement device, and down which patrons of the attraction were required to slide, is a question for the jury in an action by a patron who was injured in descending the chute, which was eighteen feet above the ground at the top and inclined at an angle of about forty degrees.

3. Whether the defendant was guilty of negligence in permitting the construction and maintenance of the device by which the plaintiff was injured, and whether the plaintiff was guilty of contributory negligence, are held, under the evidence in this case, to be questions of fact properly submitted to the jury and conclusively settled by the judgment of the Appellate Court.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding.

WINSTON, PAYNE, STRAWN & SHAW, (RALPH M. SHAW, EDWARD W. EVERETT, and JOHN C. SLADE, of counsel,) for appellant.

JAMES MAHER, and JOHN T. MURRAY, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The Branch Appellate Court for the First District affirmed a judgment of the superior court of Cook county against appellant, in favor of appellee, for \$3500 for personal injuries, and said Branch Appellate Court granted a certificate of importance, upon which a further appeal is prosecuted to this court.

Appellant is a corporation maintaining and operating a park, within which are amusements and attractions of various kinds. The park is enclosed and an admission fee of ten cents is charged for each person entering it. Inside the park exhibitions and attractions are maintained and operated by persons who have concessions from appellant. Additional charges are made by the concessioners for visitors to their respective attractions. One of the attractions in the park was operated by Paul W. Cooper and William Schmidt, concessioners, and was known as Katzenjammer Castle. Visitors to this attraction were charged ten cents admission fee, and twenty-five per cent of the admissions were paid to appellant for the concession. June 7, 1906, appellee and an escort visited the park, purchased tickets for entrance into the grounds and afterwards purchased tickets for admission to and visited Katzenjammer Castle. After passing through the building and ascending a stairway they came to a place provided for exit from the building, which was by means of a slide or chute of galvanized iron reaching from the upper story of the building to within one and one-half to two and one-half feet of the ground and inclined at an angle of thirty-five or forty degrees. Appellee objected to descending by means of this chute or slide and

asked to be permitted to pass from the building by some other way. She testified an attendant told her there was no other way, and took hold of her and pushed her on the chute in a sitting position and started her down. She went down with considerable speed, breaking her leg when she struck the ground.

At the close of appellee's evidence, and again at the close of all the evidence, appellant moved the court to direct the jury to find it not guilty, but these motions were overruled and the case was submitted to the jury, resulting in a verdict for the appellee, upon which the court rendered judgment.

The errors relied on are, that the trial court erred in not directing a verdict in favor of appellant, in not allowing a motion for new trial and in rendering judgment on the verdict, and the Appellate Court erred in not reversing the judgment for said errors.

Appellant contends that its only duty with reference to the building where the injury occurred was to use ordinary care to keep the structures and devices operated by the concessioners in a reasonably safe condition for the purposes for which they were constructed, and that it cannot be held liable for the negligence of its concessioners or their employees in operating the structures and devices. Some of the authorities appear to make a distinction between cases like the one before us and cases where the owner of premises turns them over to an independent contractor, who has the sole right to hire and discharge servants. In those cases the doctrine of *respondeat superior* does not apply to the owner, but in amusement places where space is granted for conducting attractions for the amusement of the public and for which an admission fee is charged by the concessioner and divided with the owner, there is unanimity of authority that the owner assumes an obligation that the devices and attractions operated by the concessioners are reasonably safe for the purposes for which the public is

invited to use them. While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation. *Thornton v. Maine State Agricultural Society*, 97 Me. 108; 94 Am. St. Rep. 488; *Hollis v. Kansas City Retail Merchants' Ass'n*, 205 Mo. 508; 14 L. R. A. (N. S.) 284; *Richmond and Manchester Railway Co. v. Moore*, 37 L. R. A. 258; *Thompson v. Lowell, Lawrence and Haverhill Street Railroad Co.* 170 Mass. 577; 64 Am. St. Rep. 323; *Sebeck v. Plattdeutsche Volkfest Verein*, 50 L. R. A. 199; 64 N. J. L. 624; 81 Am. St. Rep. 512; *Higgins v. Franklin County Agricultural Society*, 3 L. R. A. (N. S.) 1132; 100 Me. 565; *Texas State Fair v. Brittain*, 118 Fed. Rep. 713.

But, independently of whether appellant could be held liable for the negligent conduct and management of the Katzenjammer Castle, we are satisfied that the evidence is such as to warrant submitting to the jury whether appellant performed its duty to use due and reasonable care to see that the attractions used by its concessioners were reasonably safe for the purposes for which the public were invited to use them. To see the attractions of Katzenjammer Castle visitors were required to ascend a stairway, go through dark, narrow passages and over moving, springing and suspended floors. In the dark rooms and passages were images of goblins, heads of ferocious beasts with lighted eyes, and other hideous and fantastic figures. These, and noises made, were calculated to produce an effect upon the nerves of visitors. The exit provided for visitors who had passed through the building was by means of a chute or

slide of galvanized iron, semi-cylindrical in shape and wide enough for one to sit in and slide down. The upper end of the chute was about eighteen feet from the ground. It descended at an angle of thirty-five or forty degrees to within one and one-half to two and one-half feet of the ground. The lower end of it inclined upward, for the purpose of checking the speed of the person sliding down it. An attendant was employed to stand at the lower end of the chute and assist persons sliding down it and a rubber mat about three feet square was placed on the ground at the end of the chute, but appellee and her escort testified there was no person at the bottom of the chute when she was injured, and appellee testified she saw no rubber mat. Appellee and her escort testified appellee objected to going down the chute, but an attendant told her there was no other way for them to get out. Appellee asked to be permitted to go back the way she came, but an attendant told her she could not do so. Appellee testified the attendant took hold of her, put her in the chute and pushed her down. When she struck the bottom her leg was broken.

If, as contended by the appellant, the construction and maintenance of such a device as the only exit from the building cannot be said to be negligence *per se*, neither can it be said, as a matter of law, that it was not negligence. The declaration charges appellant with negligence in permitting the means of exit from the building to be and remain in a dangerous condition. While, so far as the proof shows, the chute was not out of repair and was in the same condition as when first constructed, whether the construction and maintenance of that kind of an exit was negligence was a question of fact proper, under the declaration, to be submitted to a jury for determination. Whether the appellee was guilty of contributory negligence was also a question of fact properly submitted to the jury. The judgment of the Appellate Court upon this question of fact is conclusive upon this court.

The court gave nineteen instructions at the request of appellant, and we do not think it was prejudiced by the refusal by the court of any of the instructions asked by it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

HENRY T. GODDARD *et al.* Appellees, *vs.* BERTIE A.
LANDES, Appellant.

Opinion filed June 20, 1911.

HOMESTEAD—the rule where heirs seek to compel vacation of homestead property worth more than \$1000. Where heirs or devisees seek to compel the surviving husband or wife to vacate homestead property which is indivisible and which exceeds \$1000 in value, a court of equity should require them to pay \$1000 to the person entitled to the homestead estate. (*Powell v. Powell*, 247 Ill. 432, followed.)

FARMER, J., dissenting.

APPEAL from the Circuit Court of Wabash county;
the Hon. E. E. NEWLIN, Judge, presiding.

H. M. PHIPPS, GEORGE B. GILLESPIE, and A. M. FITZGERALD, for appellant.

E. B. GREEN, P. J. KOLB, and GEORGE P. RAMSEY, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

The trustees under the last will and testament of Silas Z. Landes, and the heirs of testator, filed a bill in the circuit court of Wabash county against Bertie Landes, the surviving widow of testator, for the purpose of having the homestead of the widow set off and assigned to her, with an alternative prayer that in case the homestead premises were of greater value than \$1000 and so situated that the

homestead could not be assigned to her the cash value of the homestead interest be ascertained, and that the trustees under the will be authorized to pay the widow the value of her homestead estate, and that thereupon she be required to vacate and surrender possession to the persons entitled to the property under the will. The bill contains an averment that prior to the marriage of the testator and the defendant an ante-nuptial contract was entered into between the parties by which all property rights of the widow in the testator's estate were settled, except her statutory right to a homestead. The bill alleges that prior to the commencement of the suit the trustees tendered the widow \$450 for her homestead, which she refused to accept. The widow filed an answer to the bill, in which she denied all of the allegations, except the death of the testator. The case was heard upon the bill, answer and proofs, in open court, and a decree was rendered finding that the bill was true and appointing commissioners to assign the widow's homestead. The commissioners reported that they had examined the premises and found the same not susceptible of division, and valued the premises located on in-lot No. 491, in the city of Mount Carmel, at \$15,000. This report was approved by the court. The age of the widow was found to be fifty-four years and the value of her homestead was fixed at \$598.79, which was directed to be paid to her by the trustees, and the decree directed the widow to surrender possession of the homestead within fifty days from the date of the decree. The widow excepted to the decree of the court and has perfected an appeal therefrom to this court.

The sole question involved in the case below, and the only one open for consideration in this court, is the amount that should be paid to the widow for her homestead estate. The precise question here involved was recently before this court in the case of *Powell v. Powell*, 247 Ill. 432, and it was there decided that when the heirs or devisees sought

to compel the surviving husband or wife to vacate an indivisible homestead which exceeded \$1000 in value, a court of equity should require the heirs or devisees to pay the person entitled to such homestead \$1000. The case at bar falls within the rule announced in the *Powell case* and must be controlled by what was there decided. We do not deem it necessary to repeat the reasons or review the authorities upon which the *Powell case* rests. The court below erred in requiring the widow to vacate the premises and surrender her homestead upon the payment of \$598.79.

There is an allegation in the bill respecting the execution of the ante-nuptial contract and a denial thereof in the appellant's answer. No evidence was introduced by either party on this issue, except the ante-nuptial contract. No relief was prayed in regard to such contract and there is no reference to it in the record. The appellant suggests, both in her brief and in the oral argument of her counsel in this case, that she desires to save whatever right she may have to attack the validity of the ante-nuptial contract for fraud and misrepresentation. No question relating to the ante-nuptial contract was involved in this proceeding. The bill conceded that the appellant is entitled to a homestead in the premises in question, and the reference to the ante-nuptial contract in the bill seems to have been merely for the purpose of showing that the homestead right was excepted from the terms of the agreement. No adjudication of the validity of the ante-nuptial contract was necessary or proper under the issues in this case.

For the error indicated the decree of the circuit court of Wabash county is reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE FARMER, dissenting.

JOHN FLYNN, Defendant in Error, vs. THE CHICAGO CITY
RAILWAY COMPANY, Plaintiff in Error.

Opinion filed June 20, 1911.

1. EVIDENCE—*ordinance invoked as a defense is admissible under general issue.* Where a cause of action is predicated upon an ordinance the ordinance must be specially pleaded, but if an ordinance is invoked as a defense it is admissible under a plea of the general issue and need not be specially pleaded.

2. SAME—*when an ordinance requiring vehicle to display light is admissible.* Where the injury complained of resulted from defendant's street car striking a buggy which was being driven along the street in the night time without a light being displayed, the defendant is entitled to introduce in evidence an ordinance making the driving of vehicles under such circumstances unlawful.

3. NEGLIGENCE—*rule where person is injured by collision when riding in another's vehicle.* The negligence of the owner and driver of a vehicle cannot be imputed to a person who is riding with him, in case of a collision between the vehicle and the street car, but such person is responsible for his own negligence, and if his own negligence contributes to his injury he cannot recover.

4. SAME—*when person riding with another cannot recover for injury from collision.* A person injured in a collision between a street car and a buggy in which he was riding with the owner in the common enterprise of trying out the latter's horse with a view to buying it, cannot recover damages where the proximate cause of his injury was his own negligence in joining with the owner, without objection, in testing the danger of driving along the street at night without a light being displayed upon the buggy, as required by ordinance.

5. INSTRUCTIONS—*when an instruction as to contributory negligence should be given.* An instruction in a personal injury case stating that if the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger, could have avoided the injury but negligently failed to do so, and thereby contributed to his injury, then he cannot recover, states a correct proposition of law, and should be given if the principle therein contained is not covered by any other given instruction.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

GEORGE W. MILLER, (LEONARD A. BUSBY, of counsel,) for plaintiff in error.

MCGOORTY & POLLOCK, for defendant in error.

MR. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced in the superior court of Cook county by the defendant in error against the plaintiff in error to recover damages for a personal injury alleged to have been sustained by the defendant in error in consequence of a collision between a buggy in which he was riding and an electric car operated by the plaintiff in error on one of the public streets of the city of Chicago. The case was tried upon a declaration containing two counts. The negligence charged in the first count was, that the defendant, by its servants, so carelessly and negligently drove and managed said car that by and through the negligence and improper conduct of the defendant and its servants said car ran and struck with great force and violence upon and against said buggy; and the second count charged that the defendant, by its servants, carelessly and negligently drove the said car upon one of the public streets of the city without ringing a bell or giving warning of any kind. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the defendant in error in the sum of \$5000, which judgment was affirmed by the Appellate Court for the First District, and the cause has been removed into this court for further review by writ of *certiorari*.

Three reasons are urged as grounds for reversal in this court: (1) The contributory negligence of the defendant in error; (2) the rejection of proper evidence; and (3) the refusal to give to the jury plaintiff in error's fourth offered instruction.

The defendant in error and one White were riding in a single-seated buggy drawn by one horse owned and driven

by one Cox upon Sixty-ninth street, an east and west street in the city of Chicago, at about seven o'clock in the evening of February 11, 1906, on which street the plaintiff in error operated a double track electric street railway, the south track being the east-bound and the north the west-bound track. When near Prairie avenue an electric car ran against the buggy, and the same was capsized and the occupants were thrown to the ground and the defendant in error was severely and permanently injured. Thus far there is no conflict in the evidence. There is, however, an irreconcilable conflict in the evidence as to the manner in which the collision occurred. The evidence of the defendant in error tended to show that Cox was driving said horse and buggy, at a moderate speed, east upon the south track, and that a car overtook him from the west and ran against the rear of the buggy with such force that the buggy, with its occupants, was thrown over the horse, and when the car was stopped, the horse, by the force of the impact, was facing the car; while the evidence of the plaintiff in error tended to show that the horse and buggy were being driven west upon the south side of the track but in such close proximity to the south rail that the car, as it passed, struck the buggy and the buggy was capsized. It was undisputed that when the car was stopped the horse and buggy were near the south-west corner of the car and the horse was facing west; that the rear of the buggy or the front of the car was not injured, but there were marks upon the buggy and upon the car which indicated that the right front wheel of the buggy had come in contact with the south-east corner of the car. The jury accepted the view of the witnesses for the defendant in error. In the condition in which the evidence appears in this record it was necessary that the rulings of the court upon the admission of evidence and upon the instructions to the jury should have been substantially correct in order to insure to the parties a fair trial. It also appears from the evidence

that the occupants of the buggy had been drinking during the evening and were somewhat intoxicated at the time of the accident; that the horse which Cox was driving was blind; that the night was dark; that the street car was well lighted; that no light was displayed upon the buggy; that Cox was out with the defendant in error and White for the purpose of exhibiting his horse to the defendant in error with a view to sell him the horse; that they had driven some distance, a part of the time the driving being done by Cox and a part of the time by defendant in error.

At the time of the accident there was in force in the city of Chicago an ordinance which made it unlawful for the owner or driver of a wheeled vehicle similar to that in which the defendant in error was riding at the time of the accident, to use the same in the night time upon the streets of the city without having displayed thereon a light. At the time of the accident this ordinance was being violated, and the plaintiff in error, after proving that there was no light displayed upon the buggy in which Cox and his companions were riding, offered in evidence said ordinance, which was excluded by the court, and it is now urged that the action of the court in excluding such ordinance constitutes reversible error. The ruling of the court upon the admissibility of such ordinance is justified by the defendant in error on the grounds, first, that the ordinance was not specially pleaded; and second, that, conceding the ordinance was being violated by Cox at the time of the collision and that its violation was negligence *per se* as to Cox, the negligence of Cox cannot be imputed to the defendant in error, and it is urged that the ordinance, as to the defendant in error, was properly excluded.

It is undoubtedly true that where a cause of action is predicated upon a statute or ordinance the statute or ordinance must be pleaded, but where, as here, the action is not predicated upon the ordinance but the ordinance is invoked as a defense, we think such ordinance may be prop-

by one Cox upon Sixty-ninth street, an east and west street in the city of Chicago, at about seven o'clock in the evening of February 11, 1906, on which street the plaintiff operated a double track electric street railway, the south track being the east-bound and the north track the west-bound track. When near Prairie avenue an automobile ran against the buggy, and the same was capsized and its occupants were thrown to the ground and injured. The plaintiff in error was severely and permanently injured. There is no conflict in the evidence. There is no irreconcilable conflict in the evidence as to the place at which the collision occurred. The evidence tends to show that the car in error tended to show that Cox was driving his horse and buggy, at a moderate speed, upon the south track, and that a car overtook him from the north against the rear of the buggy with sufficient force to overturn the buggy, with its occupants, was the fact. When the car was stopped, the front of the car, at the impact, was facing the car; while the plaintiff in error tended to show that the car was being driven west upon the south track, and that in such close proximity to the car that it passed, struck the buggy and overturned it. It was undisputed that when the collision occurred the horse and buggy were near the front of the car, the horse was facing west, and the front of the car was facing east, and that the car upon the buggy and upon the right front wheel of the car struck the south-east corner of the buggy. The view of the scene from the car was such that it was necessary for the plaintiff in error to give notice of the mission of the car to the car, and that the car should have been stopped.

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erly admitted in evidence under the general issue. The admissibility of an ordinance under the general issue does not differ, in principle, from the admissibility of a foreign statute as a matter of defense, and the case of *Christiansen v. Graver Tank Works*, 223 Ill. 142, we think is in point. On page 151 of that case it was said: "The general rule is that a foreign law must be pleaded. That rule has its exceptions, and it does not apply in a case like this. The plea of not guilty was filed, and under that plea the appellee was properly permitted to introduce in proof, as a part of its defense, the law of the State of Indiana, so far as it was material, to show there was no liability resting upon appellee to respond in damages to appellant for the injury which he had sustained. In *City of Chicago v. Babcock*, 143 Ill. 358, on page 364, it was said: 'In such an action [an action on the case] the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter *ex post facto* which shows that the cause of action has been discharged or that in equity and conscience the plaintiff ought not to recover.' In *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, it was held that the laws of another State, as to pleading and proof, stand upon the same footing as any other facts, and are not required to be pleaded when they are mere matters of evidence." We are of the opinion the ordinance was properly admissible in evidence under the general issue.

As to the second proposition, while it is true the negligence of Cox could not properly be imputed to the defendant in error, still the defendant in error was responsible for his own negligence, and if his own negligence contributed to his injury he could not recover. It was therefore legitimate to make proof of any fact which would tend to establish the negligence of the defendant in error. The evidence showed that the defendant in error and Cox, who owned the horse and buggy, were engaged in a com-

mon enterprise, viz., that of testing the qualities of the horse; that Cox had driven the horse for a time and then the defendant in error had taken the lines; that the night was dark; that the road south of the tracks was rough; that the horse was blind; that there were three men in a single-seated buggy and that the occupants of the buggy were all more or less intoxicated. In view of these facts we are of the opinion that it was proper to make proof that the vehicle in which the parties, at the time of the accident, were riding, was being driven upon the street in violation of law, which proof would have raised the presumption that all the occupants of the buggy were, as a matter of law, guilty of negligence, which negligence, if it was the proximate cause of the injury, would defeat a recovery. This view, we think, is sustained substantially by all the authorities. Mr. Beach, in his work on Contributory Negligence, (3d ed. sec. 115,) thus states the law: "It is everywhere held, on familiar grounds, that if the negligence of the occupant contributes with that of the driver and a third person there can be no recovery against the latter. Thus, if A, being driven in the carriage of B, who is not a common carrier, willingly joins B in driving over a place obviously dangerous and is injured in consequence, A has no right of action against the municipality. And where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver, alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen. So it has been held that a failure to look and listen, on the part of one riding with his back to the driver, while approaching a well known

railroad crossing at a fast trot, or to warn the driver, or to take any precautions whatever, was contributory negligence barring recovery. In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if possible."

The author of Elliott on Railroads, (vol. 3, 2d ed. sec. 1174,) among other things, says: "The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person. But where persons riding in a vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains. Where the driver is the agent or servant of the injured person it is held that the negligence of the former is attributable to the latter. It is obvious that where the negligence of the person who receives the injury contributes to the injury he cannot escape the consequences of his own carelessness. Thus, where one person riding with another saw the headlight of an approaching locomotive, it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding. If the person riding in the vehicle knows that the driver is negligent and he takes no precautions to guard against injury he cannot recover, for in such case the negligence is his own and not simply that of the driver. The plaintiff can not rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge."

In *Hoag v. New York Central and Hudson River Railroad Co.* 111 N. Y. 199, a husband and wife were killed by collision with a passenger train while attempting to cross the company's track at a crossing. The husband was driving, and the wife, for whose death the suit was brought, was riding with him on the way to their home. There

was a directed verdict for the defendant and judgment thereon. The Court of Appeals reversed this judgment on the ground that under the facts in that case the question of contributory negligence on the part of the wife should have been submitted to the jury, and Judge Finch, writing for the court, suggested the inferences which could be drawn both for her and against her from the evidence on that question. The following quotation from the opinion is directly in point (p. 203): "If they did not see it, [referring to the train,] or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe."

In *Brickell v. New York Central and Hudson River Railroad Co.* 120 N. Y. 290, the Court of Appeals had the same question before it again. The plaintiff was injured through a collision between a wagon in which he was riding and an engine hauling a train, at a highway crossing. The plaintiff was riding on the same seat with the driver of a single-horse buggy and paid the driver for carrying him a short distance from a station on the company's road to the village of Palmyra. The accident was in the early afternoon. It had been snowing some, the wind was blowing and the top of the buggy was raised and enclosed, except in front. Neither the driver nor the plaintiff made any effort, as they approached the crossing, to ascertain if a train was approaching. There was a judgment in favor of defendant, which the Court of Appeals affirmed. The court in its opinion said that the evidence showed contributory negligence on the part of the plaintiff, and then continued (p. 293): "The excuse attempted to be set up for such conduct, that the top of the buggy and the snow and wind rendered it more difficult to hear the noise of an

approaching train, seems to prove and emphasize their carelessness and want of attention in making an effort, under those circumstances, to learn there was no train approaching the crossing. They well knew of the condition of things and of the location and surroundings of the crossing, and that they were called upon to use more than ordinary prudence in effecting the crossing under such circumstances. The general rule in this class of cases is, that the burden of establishing, affirmatively, freedom from contributory negligence is upon the plaintiff, or, in the language of the opinion in *Tolman v. S. B. & N. Y. R. R. Co.* 98 N. Y. 202, that 'plaintiff approached the crossing where the collision and injury occurred, with prudence and care and with senses alert to the possibility of approaching danger.' And this rule obtains even where the railroad company neglects to ring its bell or sound its whistle, as required when its trains approach a crossing. (*Cullen v. D. & H. C. Co.* 113 N. Y. 688.) Nor do I think that this rule is to be relaxed in favor of the plaintiff because of the fact that he was being carried in a vehicle owned and driven by another. The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an enclosure, and is without opportunity to discover danger and to inform the driver of it. (*Robinson v. New York Central and Hudson River Railroad Co.* 66 N. Y. 11.) It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable. The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing and the environments, and with at least the same, if not better, opportunity of discovering dangers, that the driver possessed and without any embarrassment in com-

municating them to him. The rule in such case is laid down in *Hoag v. New York Central and Hudson River Railroad Co.* 111 N. Y. 199, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both killed by a collision at a crossing, and in an action brought by the administratrix of the wife against the railroad company it was held 'that she had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe.' "

In *MacGuire v. New York City Railway Co.* 102 N. Y. Supp. 749, the plaintiff and Dr. Mandel were sitting on the back seat of plaintiff's victoria, drawn by two horses driven by a coachman. There was a collision between the victoria and a street car, resulting in the plaintiff's injury, for which he sued and recovered a judgment, which, on appeal, was reversed. This case contains an element not in the *Hoag* and *Brickell* cases,—i. e., the driver was the servant of the plaintiff,—so that it might be said that the plaintiff, having control over the driver, was chargeable with his negligence, but the opinion turns upon the negligence of the plaintiff himself rather than upon the negligence of the driver. The court said in reversing the judgment (p. 751): "It is urged by defendant's counsel, in his brief, that the plaintiff must have known that by this time the north-bound car was pretty close at hand and that the south-bound car might to some extent obstruct the view of the motorman of the north-bound car, so far as plaintiff's carriage was concerned, and that plaintiff said nothing to his driver but ran the risk of getting over before the car struck him. We are of the opinion that plaintiff did not satisfactorily establish his freedom from contributory negligence." It is a case where the coachman, driving, waited for a south-bound car to pass and then started to drive slowly across the tracks on Broadway, when the fore-part of the carriage was struck by an approaching north-bound

car. Plaintiff admitted that he saw the north-bound car rapidly approaching. His victoria then stopped for the south-bound car to pass, and he then allowed his driver to start over the tracks with the view somewhat obstructed by the south-bound car and without taking any precautions whatever to caution or warn the driver of the danger, and this was held to be negligence upon his own part which would defeat him, although the driver was also negligent in undertaking to cross the tracks without any effort to observe if a north-bound car was coming.

Donnelly v. Brooklyn City Railroad Co. 109 N. Y. 16, was a case where the plaintiff, with one McNally, had driven to the city of Brooklyn in the evening in a wagon drawn by one horse, with a load of fish for market. They started to return about midnight, taking the route of an avenue on which were two tracks of the defendant, upon which were run, either way, trains of cars drawn by dummy engines. The tracks were in the middle of the avenue, with sufficient width on either side for vehicles. McNally was driving, with plaintiff riding by his side. They had been driving on the right-hand railroad track, when, hearing a wagon approaching, they turned to the left and drove upon the other track, used by trains coming towards Brooklyn. While upon this track they saw and heard coming towards them in the distance a dummy engine. No effort seems to have been made by either of them to escape from the danger of collision. The plaintiff did nothing "except to sit on the wagon and shout twice to the engineer to hold up." He made no objection to McNally turning into the track where they were then driving, although acquainted with the avenue and the tracks, and apparently made no effort to get McNally to drive out of the track when he saw the dummy engine coming. A judgment which he obtained for his injuries was reversed. The Court of Appeals, speaking through Mr. Justice Gray, said that the case should not have been submitted to a jury. On page 22 of

the opinion the court said: "We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous track. * * * After a careful consideration of this case we think, in view of the knowledge possessed by plaintiff and of his conduct at the time, that there was contributory negligence and he was not entitled to recover."

Smith v. Maine Central Railroad Co. 87 Me. 339, is directly in point. The plaintiff accepted an invitation from one Ryder to ride with him to a neighboring town. Ryder was driving. Smith had no more control over him nor over the team than anyone may be said to have riding by invitation in a buggy with another. They were injured in a collision while attempting to cross the defendant's tracks at a railroad crossing. There was a verdict in favor of the plaintiff. Under the practice in Maine the case reached the Supreme Court under a motion to set aside the verdict, where it was held that the verdict was not justified by the evidence and could not be permitted to stand. Among other things the court said, in speaking of the accident (p. 350): "It was undoubtedly caused, directly or proximately, by a want of due care and prudence on the part of the plaintiff himself. True, the plaintiff was not in control of the team as driver, but was riding by a friendly invitation from Ryder and without other compensation than his companionship. But the rule that the negligence of the driver is not to be imputed to his companion under such circumstances has very little application to the facts of this case. Plaintiff was occupying the same seat with Ryder, and had the same opportunity, and after they reached the defendant's main track probably a better opportunity, for discovering dangers. Before reaching the Bangor and

Aroostook track they conversed about the lights of the defendant's station, and after crossing stopped and had a further conference, at which they agreed in 'guessing that everything was all right.' It is obvious that the driver was ready and willing to act upon any information or suggestion from his companion. It is clear, also, that the plaintiff instinctively felt that there was a responsibility resting upon him as well as upon the driver. He knew that they were crossing railroad tracks, and was bound to know that a railroad track is itself a warning and a crossing a place of danger. He admits that when within fifty feet of the collision he voluntarily assumed the duties of a lookout. He saw the headlight, which Ryder does not appear to have seen, but did not mention the fact to Ryder. The horses were steady and well trained and would have promptly heeded the word to stop either from the plaintiff or the driver, but the plaintiff neither asked the driver to stop the horses nor to hurry them forward. His conduct was not that of a reasonably prudent man. It is the duty of the passenger, when he has the opportunity to do so, as well as of the driver, to learn of danger and avoid it if practicable. * * * In either view, the contributory negligence of the plaintiff is clearly established."

In *Bush v. Union Pacific Railroad Co.* 62 Kan. 709, (64 Pac. Rep. 624,) the plaintiff, a young lady, was invited by one Bowhay to ride with him on the evening of the accident. In attempting to cross the company's railroad tracks at a railroad crossing they were struck by a passenger train and she sued to recover for the injuries received. It will thus appear that she was merely an invited guest and that Bowhay was driving. At the close of the plaintiff's evidence the defendant demurred thereto, and the court sustained the demurrer and rendered judgment against the plaintiff for costs. On appeal this judgment was affirmed, and the plaintiff was held to have been guilty of such contributory negligence as defeated her right to

recover. In the course of the opinion it was said: "It is contended by plaintiff in error that if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains such negligence is not imputable to the plaintiff in error. The want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose—mutual pleasure. Her opportunity and ability to see and appreciate the danger were equal to his. She was in no way relying upon him. It is true, he furnished the vehicle and did the driving, but she seems to have acted independently of him. When they started from the point where they had stopped for the freight train, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was, in fact, the first to see it."

In *Illinois Central Railroad Co. v. McLeod*, 52 L. R. A. 954, (78 Miss. 334,) McLeod hired an open carriage, two horses and a driver to drive him to his desired destination and back again. In attempting to cross a railroad crossing he was injured in a collision between a train and the conveyance in which he was being driven. It was an open conveyance and McLeod had every opportunity the driver had to avoid the accident. He died from his injuries and suit was brought to recover for his death. A judgment was recovered, which the court reversed, saying, among other things (p. 956): "Mr. McLeod gave the driver no directions at all and in no way interfered with his management of the team. From the facts so put it is too plain for controversy that if the driver had been the party killed no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. McLeod in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the driver, the vehicle and the team.

But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action and to check or remonstrate with the driver.—*Dean v. Pennsylvania Railroad Co.* 129 Pa. 514; 6 L. R. A. 143; 18 Atl. Rep. 718; *Smith v. Maine Central Railroad Co.* 87 Me. 350; 32 Atl. Rep. 967, and the other authorities cited in the brief of counsel for appellant.”

Fechley v. Springfield Traction Co. 96 S. W. Rep. 421, (119 Mo. App. 358,) is an interesting case, where all of the leading authorities are referred to. Fechley was injured by the collision of a street car with a buggy in which he was riding. It was a one-horse buggy belonging to a man named Pierce, and Pierce was driving. It was election day, and Pierce, who was interested in a candidate for sheriff and who had endeavored to induce Fechley to vote for his candidate, was driving Fechley to the north side of the city, having invited Fechley to ride over in his buggy to make him acquainted with the candidate. Fechley accepted the invitation and got into the buggy, and they were proceeding upon this errand when the collision occurred. There was a judgment for the defendant, which was affirmed. Among other things the court said, on page 423: “Appellant himself must have been free from negligence proximately contributing to his injury or he is entitled to no damages, granting that Pierce’s fault does not preclude a recovery and that the motorman’s fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may entrust his safety absolutely to the driver of a vehicle, regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this State and in most jurisdictions is, that if a passenger is aware of the danger and that the driver is remiss in guard-

ing against it and takes no care himself to avoid injury, he cannot recover for one he receives. This is the law, not because the driver's negligence is imputable to the passenger, but because the latter's own negligence proximately contributed to his damage.—*Marsh v. Railroad Co.* 104 Mo. App. 577; 78 S. W. Rep. 284; *Dean v. Railroad Co.* 129 Pa. 514; 18 Atl. Rep. 718; 6 L. R. A. 143; 15 Am. St. Rep. 733; *Township of Crescent v. Anderson*, 114 Pa. 643; 8 Atl. Rep. 379; 60 Am. Rep. 367; *Koehler v. Railroad Co.* 66 Hun, 566; 21 N. Y. Supp. 844; *Hoag v. Railroad Co.* 111 N. Y. 199; 18 N. E. Rep. 648; *Brickell v. Railroad Co.* 120 N. Y. 290; 24 N. E. Rep. 449; 17 Am. St. Rep. 648; 2 Thompson on Negligence, sec. 1621; Beach on Cont. Negligence, sec. 115; 3 Elliott on Railroads, sec. 1174." The court then proceeded to discuss the question of Fechley's contributory negligence, and further said (p. 424): "Fechley was imprudent in doing nothing, personally, to insure his safety. The essential fact is that Pierce did not look in time, as Fechley knew or in reason ought to have known. Therefore Fechley should have stopped Pierce or told him to look for a car, or have looked himself, before they advanced so far into danger. It is palpable, from appellant's own testimony, that he was giving no heed to his safety, but either was relying blindly on Pierce, or for some reason was not aware of the proximity of the tracks."

In *Lake Shore and Michigan Southern Railway Co. v. Boyts*, 16 Ind. App. 640, Boyts was riding in a cutter with a friend named Hamilton, whose cutter it was, and who sat in the same seat with Boyts and was doing the driving. Boyts was injured through a collision with a railroad train while attempting to cross the company's tracks. A judgment in his favor was reversed, with instructions to enter a judgment in favor of the company. The following from the opinion is directly in point (p. 647): "But even if the negligence of the driver (Hamilton) cannot be

imputed to the appellee,—and, as shown by the above cases, it cannot be,—the appellee must still show that he was free from negligence contributing to his injury. And the same rule would not apply where the guest was riding inside a closed carriage, without opportunity to discover danger and inform the driver of it, that would apply where the guest was seated at the driver's side and had the same opportunity with the driver to discover and avoid danger. (*Brickell v. New York Central and Hudson River Railroad Co.* 120 N. Y. 290.) Although he may be simply a guest, if he has the opportunity to do so it is no less his duty than it is the duty of the driver, when approaching a railroad crossing, to look and listen and to learn of danger and avoid it if practicable."

In *Miller v. Louisville, New Albany and Chicago Railway Co.* 128 Ind. 97, the intestate and her husband were riding along the highway in an ordinary farm wagon, with the husband driving and managing the team. Attempting to cross a railroad track they were struck by an approaching train and the intestate was killed. It appeared the negligence of her husband was made clear by the evidence, so that the question whether she could be charged with that negligence was directly involved, and if not, then whether she was herself guilty of such negligence as defeated the right to recover for his death. The court made mention of the fact that the doctrine of *Thorogood v. Bryan*, 8 C. D. 115, had never been sanctioned by that court, and among other things said (p. 99): "Rejecting, as we do, the doctrine of imputed negligence, we are nevertheless required to hold that there can be no recovery in this action. We are led to this conclusion by the fact that the intestate was not shown to be free from contributory negligence. It has long been the settled law of this State that a plaintiff can not recover in such a case as this unless it affirmatively appears that his own negligence did not proximately contribute to his injury. * * * The intestate approached a

crossing known to her to be dangerous, and approached it when a train was in full view, and took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care. The rule we adopt is laid down in the well reasoned case of *Brickell v. New York Central and Hudson River Railroad Co.* 120 N. Y. 290."

In *Brannen v. Kokomo Gravel Road Co.* 115 Ind. 115, the plaintiff, with several others, was riding in a wagon driven by one of the other occupants of the wagon. The driver, it appears, was intoxicated. As they approached a toll-gate owned by the defendant an attempt was made by the driver to drive rapidly through the gate to avoid payment of toll. The defendant had a pole so arranged that it could be thrown across the passageway through the gate to prohibit people from driving through, and the defendant's employee in charge of the gate attempted to stop the driver from driving through by dropping this pole, and in so doing the pole struck the front end of the wagon and the plaintiff was injured. The court held that the plaintiff could not be charged with the negligence of the driver but that he was chargeable with his own negligence, and that because of his own negligence he could not recover. The following is quoted (p. 118) from the opinion: "In the first place, the intoxication of the driver and his course in striking the young horses and attempting to run them through the gate without the payment of toll show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due and should be paid at the toll-gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate

without the payment of toll. For aught that is shown in the special verdict, he was acquiescing in the purpose of the driver and all that he did in attempting to carry out that purpose. Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed to the injury, it must follow that he cannot recover."

In *Township of Crescent v. Anderson*, 114 Pa. St. 643, Mrs. Anderson was riding in a spring wagon, having with her three small children. Her father sat on the front seat and was driving. The seat on which Mrs. Anderson rode was fastened by a spring catch, so as to be removable at pleasure. When they reached a bridge in the highway it was found to be in the process of repair and could not be crossed. There was a space above the bridge wide enough to admit a wagon, and through this space McKinley, the father, drove to the other side. As the front wheels ascended the bank from the ravine through which they drove, one of the catches on the seat on which Mrs. Anderson rode sprang out, the seat turned over and she was precipitated into the ravine and injured. She and her husband sued the township and there was a judgment obtained, but the Supreme Court of Pennsylvania reversed it. Discussing the negligence of Mrs. Anderson herself,—and that was what defeated her,—the court said (p. 646): "She came to the bridge in daytime, about eleven o'clock in the morning, and she could see plainly that the route around the bridge was not prepared for the passage of vehicles. The ravine, its approaches, its depth and width were all fully exposed to view. There was no water in it. There was no latent defect or danger. If it was a dangerous place she could as readily discern the fact as her father or the supervisor, and it was her duty to see what was clearly exposed to her view. Under the noting of *Carlisle v. Brisbane*, 18 W. N. C. 220, (3 Ammerman, 544,) the negligence of McKinley could not, perhaps, be imputed to her,

but she must be held for her own negligence. The danger which was obvious to him was as obvious to her. She made no request of her father to take any other route, so that she might get out of the wagon. She made no objection to crossing the ravine. She willingly joined McKinley in testing the danger, and she is responsible for the consequences of her own act."

In *Dean v. Pennsylvania Railroad Co.* 6 L. R. A. 143, (129 Pa. St. 514,) Dean, while crossing the tracks of the defendant company in a wagon, was struck by a locomotive and injured. Fields was the owner of the horse and wagon and was driving. Under the evidence the negligence of Fields was clear. The court so held, and then inquired, "But can the negligence of Fields be imputed to Dean?" There then followed a somewhat extended analysis of the authorities holding that Dean was not chargeable with the negligence of Fields, when the court, taking up directly the question whether Dean was guilty of negligence, concluded (p. 145): "Dean knew the locality well. He had crossed the tracks frequently at this point. He knew that a train was due about that time and that he was approaching the railroad track at a fast trot, yet he took no precautions. He was certainly responsible for his own negligence. He sat with his back to the driver, and although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look and listen or to permit him (Dean) to get out, and the danger was as obvious to Dean as it was to Fields. The testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields; that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Township of Crescent v. Anderson*, 114 Pa. 643; 6 Cent. Rep. 616." A judgment of non-suit entered by the lower court was affirmed.

We have not been able, in the course of our research, to find, neither have counsel pointed out, any case decided by this court where this precise question has been considered. It is clearly, however, we think, the law of this State that under conditions such as are presented here the negligence of Cox will not be imputed to Flynn. But, as was said at the outset, Flynn is not sought to be charged with the negligence of Cox but with his own negligence, and that he may be so charged is abundantly sustained by these authorities. Flynn knew the whole situation as it existed. He joined Cox and White in testing the danger of driving along that street, whether east or west, at that time of night without a light upon the buggy. The plaintiff in error had a right to show the jury the conditions under which the buggy was being driven, and one of the things which the jury had the right to know, and which the plaintiff in error was entitled to prove, was that the buggy was being driven upon the streets of Chicago in the night time in violation of an ordinance of the city, which was negligence *per se*. The plaintiff in error's fourth refused instruction reads as follows:

"If you believe, from the evidence, that the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger, could have avoided injury on the occasion in question, and that he negligently failed to do so and thereby contributed to the injury, if you believe he was injured, then he cannot recover in this case."

This instruction stated a correct proposition of law, and as the principle therein contained was not covered by any given instruction, we think its refusal constituted reversible error. The principle of this instruction was approved in *Chicago City Railway Co. v. O'Donnell*, 208 Ill. 267.

The judgments of the superior and Appellate Courts will be reversed and the cause will be remanded to the superior court for a new trial. *Reversed and remanded.*

REUBEN B. STRAW *et al.* Appellees, *vs.* FRANK J. BARNES
et al. Appellants.

Opinion filed June 20, 1911.

1. WILLS—*natural heirs will not be disinherited by dubious words.* Natural heirs will not be disinherited by dubious and ambiguous words used by the testator in the will.

2. SAME—*word "or" is ordinarily used as a disjunctive word.* While the word "or" may sometimes be read as "and," it is ordinarily used as a disjunctive word, and will be so treated unless it appears to be contrary to the testator's intention.

3. SAME—*devise to "brothers and sisters or their heirs" construed.* Where a testator, having no children and having made provision for his wife, gives the residue of his property to his "brothers and sisters or their heirs," the devise will be held to include the heirs of a deceased brother and sister whose deaths had taken place before the testator executed his will, where such construction carries out the apparent scheme of the testator, viewed in the light of the surrounding circumstances, and there is nothing to indicate a contrary intention.

APPEAL from the Circuit Court of Carroll county; the Hon. OSCAR E. HEARD, Judge, presiding.

WILLIAM N. CRONKRITE, and JOSEPH H. VINCENT, for appellants.

COOK & COOK, and JOHN R. CONNELL, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by Reuben B. Straw in the circuit court of Carroll county against the widow, brothers, sisters, nephews and nieces and grand-nieces of Nathaniel H. Straw, deceased, his brother, for the partition of certain real estate situated in Carroll county of which Nathaniel H. Straw died seized. Answers and replications were filed and the cause was referred to a master to take the proofs, and the court entered a decree finding that the brothers and sisters of said Nathaniel H. Straw, deceased,

who survived him, took by devise from the testator all of the real estate of which he died seized, with the exception of the real estate which was devised to the widow and one small tract of land which he had purchased subsequent to the date of the will, which was held to be intestate property, and entered a decree for the partition thereof among said surviving brothers and sisters, and the appellants have prosecuted this appeal.

The facts involved in this controversy, in brief, are as follows: Nathaniel H. Straw was a justice of the peace and retired farmer who had lived in Carroll county for many years and had accumulated a considerable estate, consisting, at his death, of real and personal estate of about the value of \$30,000. On the 11th day of December, 1893, he executed a holographic will, which, omitting the formal parts, reads as follows:

"First—I order and direct that my executors hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife, Susan E. Straw, the house where we live, with all in the house, of every kind and nature, except the money and notes, and the east half of the north-east quarter section 14, town 25, range 6.

"Third—The west half of the north-east quarter section 14, town 25, range 6, to my brothers and sisters or their heirs; also the house and lots in Shannon & Bradshaw's addition to the village of Shannon, being lots (1) one and (4) four in block 4, and also lot (3) three, in block (9) nine, same addition; then \$2000 to my brothers and sisters or their heirs; then out of the balance, when collected, my wife is to have one-half, the other half to my brothers and sisters or their heirs.

"Lastly, I make, constitute and appoint Reuben B. Straw and Susan E. Straw, my wife, to be executors of this my last will and testament, hereby revoking all former wills by me made."

The testator died on the 11th day of January, 1910, whereupon said will was admitted to probate in the county court of Carroll county and Reuben B. Straw qualified as executor. At the time of his death Nathaniel H. Straw left him surviving Susan E. Straw, his widow; Reuben B.

Straw, Joseph F. Straw and Emma Sherretts, his brothers and sister of the full blood; Sarah Tures, Lillian Butterfield, Delmar Straw, John Straw and Mabel Buckingham, his brothers and sisters of the half blood; Ella Shoals, Harry Straw and Ethel Williams, the son and daughters of William H. Straw, a brother of the full blood, who had predeceased the testator by twenty-five years; Minerva E. Beaver, Frank Barnes, Robert S. Barnes and Senada G. Linder, the sons and daughters of Lydia Barnes, a sister of the full blood, who had predeceased the testator about twenty-two years; and Luella McBride and Rosella McBride, the daughters of Etta McBride, a deceased daughter of William H. Straw, deceased, who died three years prior to the death of Nathaniel H. Straw, as his sole and only heirs-at-law.

The sole question in this case is as to the proper interpretation and construction to be placed upon the words "my brothers and sisters or their heirs," found in the third paragraph of the will. The eight brothers and sisters,—three of the full blood and five of the half blood,—were all living at the date of the will and at the date of the death of the testator, and the trial court held that the words "my brothers and sisters or their heirs," found in the third paragraph of the will, only included the brothers and sisters of the testator who survived him, and gave to those brothers and sisters the entire estate, to the entire exclusion of the children of the brother William H. Straw and the children of the sister Lydia Barnes, it being the theory of the decree entered by the court that the children of the deceased brother and sister who had died before the date of the execution of the will and the date of the death of the testator were excluded from a participation in the distribution of the estate of Nathaniel H. Straw, deceased. We do not agree with the construction placed by the court upon those words. To so construe those words is to entirely eliminate from the will the words "or their heirs," unless those words be

limited to the children of the brothers and sisters who were living at the date of the execution of the will and who should die between the date of the will and the date of the death of the testator. We see no valid reason for so limiting those words. The testator knew his brother William and his sister Lydia were both dead at the time he made his will, leaving them surviving children. The deceased brother and sister were of the full blood, and we are unable to discover why the testator should make provision, in the event of his death, that his nephews and nieces and grand-nephews and nieces of the half blood should enjoy his bounty to the exclusion of his nephews and nieces of the full blood. The children of William and Lydia, upon the death of Nathaniel H. Straw, would be the natural heirs, in part, of the testator and entitled to share in the distribution of his estate unless by his will he clearly made it manifest that he intended to disinherit them. Natural heirs will not be disinherited by dubious and ambiguous words. *Olcott v. Tope*, 213 Ill. 124.

Numerous cases have been cited by the appellees where deceased brothers and sisters and children and their heirs have been held to have been excluded by expressions found in wills which are somewhat analogous to the language found in this will, but none of those cases are directly in point and we do not think any of them are controlling in this case. No two wills are precisely alike, and the conditions which surround one testator may differ so widely from those which surround another that the conclusion reached in one instance is of little value as a guide in another. (*Dee v. Dee*, 212 Ill. 338.) It is to us obvious that the testator, being childless, after he had made ample provision for his widow, desired that the remainder of his estate should be equally divided among the members of his family,—that is, between his brothers and sisters, if living,—and if one or more were dead at the time he made the will or should die subsequent to the date of his will and prior

to his death, that the children of such deceased brother or sister should take the parent's share. Had the word *and* been used instead of the word *or*, the meaning of the will would, perhaps, be more doubtful and probably susceptible to the construction placed thereon by the chancellor. While the word *or* will sometimes be read as *and*, ordinarily it is used as a disjunctive rather than as a conjunction, and in this case the word should, we think, be given its ordinary meaning, the result of which is, there are two classes of beneficiaries designated in the will, viz., first, the brothers and sisters of the testator; and secondly, the heirs of the brother and sister of the testator who predeceased the testator. The construction placed upon the words "my brothers and sisters or their heirs" by the appellants, we are satisfied, when the whole will is considered in connection with the circumstances which surrounded the testator at the time he made the will, does justice to all parties in interest and fully effectuates the intention of the testator as expressed in his will, while the construction contended for by the appellees we think strained and unnatural and one which works a great injustice to the children of William H. Straw and Lydia Barnes.

From a careful study of this record we have reached the conclusion that the circuit court erred in so construing the will as to exclude the children of William H. Straw, deceased, and the children of Lydia Barnes, deceased, from participating in the division of the estate of Nathaniel H. Straw, deceased.

The decree of the circuit court will therefore be reversed and the case will be remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE CITY OF CHICAGO, Appellant, vs. THE CHICAGO AND
OAK PARK ELEVATED RAILROAD COMPANY, Appellee.

Opinion filed June 20, 1911.

1. MUNICIPAL CORPORATIONS—*what is not a track elevation ordinance.* An ordinance prohibiting a corporation from running cars on any track on the surface of a street across an intersecting street where the track parallels an elevated railroad and any rail of the track is within fifteen feet of the end of any abutment wall of a bridge which carries the elevated tracks across such intersecting street, is not a track elevation ordinance.

2. SAME—*ordinance which has become void for non-acceptance has no force for any purpose.* Where an ordinance requiring a street railway company to elevate its tracks provides that it shall be null and void if not accepted by the company within a specified time, a failure of the company to accept the ordinance within that time renders the ordinance void, and it has no more force for any purpose than though it had never been passed.

3. SAME—*grant of use of streets is not mere license.* A grant, by ordinance, of the use of a street by a street railway company, when based upon adequate consideration and accepted and acted upon by the company by building the road in compliance with the ordinance, is not a mere license revocable at the pleasure of the municipal corporation, but is a contract binding not only upon the municipal corporation which passed the ordinance, but also upon the one which subsequently annexes the territory.

4. SAME—*city cannot, under guise of regulation, deprive street railway company of its property.* A city has the right, in the exercise of its police power, to regulate the use of a street railway company's tracks and cars in a reasonable manner, but it cannot, under the guise of regulation, deprive the company of its property or of any of its essential rights acquired under its contract whereby the tracks were laid.

5. SAME—*power to regulate lawful business does not authorize its prohibition.* The right of a city, in the exercise of its police power, to regulate any business or the use of property does not amount to power to prohibit the conducting of a lawful business or to suppress entirely the use of the property.

6. SAME—*city cannot, by mere declaration, establish that the operation of a railroad is a nuisance.* The public welfare demands that there should not be a discontinuance of the operation of an authorized railroad, and where a railroad is authorized by ordinance and constructed in accordance therewith, the city cannot, by

a mere declaration, establish that the operation of the railroad is a nuisance.

7. SAME—*fact that crossings are dangerous does not authorize deprivation of use of street.* The fact that the crossings of a duly authorized street railway company have become dangerous by reason of the elevation of the tracks of a parallel steam railroad does not empower the city, under the guise of regulation, to deprive the company of its right to use the street under the ordinance authorizing the construction and operation of the road.

8. SAME—*when ordinance concerning operation of street cars is invalid.* Where a street railway company, under authority of an ordinance, has constructed a double-track surface railway over the portion of a street specified in the ordinance, a subsequent ordinance prohibiting the running of surface cars across any intersecting street where the track parallels an elevated railroad and is within fifteen feet of the abutment of any bridge carrying the elevated tracks across such intersecting street is invalid as to such company if its effect is to deprive the company of the entire use of one of its tracks and compel it to operate a single-track railway.

APPEAL, from the Municipal Court of Chicago; the Hon. JOHN C. SCOVEL, Judge, presiding.

EDWARD J. BRUNDAGE, Corporation Counsel, (CHARLES M. HAFT, of counsel,) for appellant:

While a corporation derives its right to exist from the State, its right to occupy the public highways of a municipality is derived solely from such municipality. *Byrne v. Railway Co.* 169 Ill. 75.

The city of Chicago is clothed with general police power over the streets within its confines. *Railway Co. v. Lake View*, 105 Ill. 183 and 207.

The city of Chicago has general power to prescribe what are nuisances and to abate the same. *Railway Co. v. Lake View*, 105 Ill. 207.

A municipality cannot, by the terms and conditions of an ordinance, deprive itself of the power to make regulations and restrictions for the preservation of the health, safety, comfort and convenience of the people, and it is immaterial what form such attempt may assume,—it is

nugatory in all instances. *Chicago v. Traction Co.* 199 Ill. 259; *Railroad Co. v. Duluth*, 208 U. S. 581; *Railroad Co. v. Defiance*, 167 id. 97.

When an ordinance is passed it is presumably valid, and before a court will be justified in holding it invalid, the unreasonableness or want of necessity for such a measure for the public safety and for the protection of life and property should be clearly made to appear. *Hawthorn v. People*, 109 Ill. 302; *People v. Railway Co.* 232 id. 292; *Railway Co. v. Steckman*, 224 id. 500.

The inhibitions of the constitution of the United States upon the impairment of the obligation of contracts without due process or of the equal protection of the laws of the United States are not violated by the legitimate exercise of the legislative power in securing the safety, health, comfort or convenience of the public. *Railway Co. v. Bristol*, 151 U. S. 556.

A right of way ordinance, such as that granted by the town of Cicero to construct and maintain the tracks in question, does not operate to deprive the city of the general power of control over the streets, delegated to the municipality by the General Assembly. *Chicago v. Traction Co.* 199 Ill. 259; *Railroad Co. v. Quincy*, 136 id. 563.

The police power comprehends the public safety, health, comfort and convenience. *Chicago v. Traction Co.* 199 Ill. 259; *Railway Co. v. Chicago*, 140 id. 309; *Railway Co. v. Drainage Comrs.* 200 U. S. 561; *Railway Co. v. Bristol*, 151 id. 556.

The various States did not, by the adoption of the Federal constitution, surrender their police power, and that power extends to the entire property and business within the State. It rests upon the fundamental principle that everyone shall so use his own as not to wrong or injure another. To regulate and abate nuisances is one of its ordinary functions. *Fertilizing Co. v. Hyde Park*, 97 U. S.

659; *Mugler v. Kansas*, 123 id. 623; *Munn v. Illinois*, 94 id. 113.

Although a structure placed over, under, along or across a highway does not, at the time of its construction, necessarily obstruct or interfere with the use of such highway, nevertheless, if by reason of a change of circumstances such structure becomes an obstruction, the governmental power may, without compensating its owner, require such owner to remove it. *Railway Co. v. Chicago*, 201 U. S. 506; *Railway Co. v. Drainage Comrs.* 200 id. 561.

A municipality, in the exercise of its police power, has plenary authority to require a street railway company to change the location of its tracks laid in the streets of the municipality. *Railroad Co. v. Defiance*, 167 U. S. 88; *Railroad Co. v. Baltimore*, 166 id. 673.

CLARENCE A. KNIGHT, WILLIAM G. ADAMS, and EDWIN WHITE MOORE, for appellee:

The city of Chicago, in the exercise of its police power, while it may regulate the use by appellee of its tracks and cars in a reasonable manner, cannot, under the pretense of regulation, deprive appellee of any of its property or of its essential rights and privileges. The ordinance in question wholly destroys appellee's use of one of its tracks. It is not in any sense a regulation of the use of this track. It is therefore a violation of rights guaranteed to appellee by the constitution of the United States and by the constitution of Illinois. *Railroad Co. v. Railroad Comrs.* 19 Fed. Rep. 679; *Turf Ass'n v. Greenberg*, 204 U. S. 363; *Chicago v. Jackson*, 196 Ill. 504; *Champer v. Greencastle*, 138 Ind. 350; *Minnesota v. Barber*, 136 U. S. 319; *Railroad Co. v. Bowers*, 4 Houst. 537; *Parker & Worthington on Public Welfare and Safety*, sec. 367; *Railroad Co. v. Cordele*, 128 Ga. 293; *Seattle v. Railroad Co.* 6 Wash. 379; *Telephone Co. v. Pomona*, 172 Fed. Rep. 829.

The right granted to appellee by the town of Cicero to use the streets is property. *Bailey v. People*, 190 Ill. 33; *Coal Co. v. People*, 147 id. 66; *Bridge Co. v. Bridge Co.* 7 N. H. 35; *Ritchie v. People*, 155 Ill. 105; *Railway Co. v. Railway Co.* 87 id. 324; *Railway Co. v. Railway Co.* 115 id. 385; *Dixon v. People*, 168 id. 190; *Gillespie v. People*, 188 id. 183.

The grant by a municipality of the right to use a street, when accepted, constitutes a contract between the municipality and the grantee, which is binding and obligatory upon both parties. *Gas Light Co. v. Lake*, 130 Ill. 54; *Railway Co. v. People*, 73 id. 541; *Quincy v. Bull*, 106 id. 337; *Belleville v. Railway Co.* 152 id. 185; *People v. Railroad Co.* 235 id. 379; *Railroad Co. v. Chester*, 121 Pa. St. 44; *People v. Blocki*, 203 Ill. 372.

The ordinance in question, if complied with, would not in any degree contribute to the safety of the public at the crossings, while its enforcement would cause great detriment and pecuniary loss to appellee. It is therefore unreasonable. In order to sustain an act of police power it must appear to the court that it would tend to promote the welfare of the public. It does not appear from the evidence that the tracks in question, at a distance of fifteen feet from the abutments, would make the crossings any safer than at the present distance of nine feet. 22 Am. & Eng. Ency. of Law, 938; *Lawton v. Steele*, 152 U. S. 136; *Railroad Co. v. McClelland*, 25 Ill. 129; *Hennington v. Georgia*, 163 U. S. 299; *Railroad Co. v. Connersville*, 147 Ind. 277; *Chicago v. Railway Co.* 244 Ill. 227; *Lake View v. Tate*, 130 id. 252; *Wice v. Railroad Co.* 193 id. 351; *Railway Co. v. Carlinville*, 200 id. 314; *Railroad Co. v. Dallas*, 70 L. R. A. 850; *Hannibal v. Telephone Co.* 31 Mo. App. 33; *Ex parte Kelso*, 82 Pac. Rep. 241.

A street railroad duly authorized by the city to use the street cannot lawfully be declared to be a nuisance and abated as such. *Railroad Co. v. Joliet*, 79 Ill. 44; *Railroad*

Co. v. Loeb, 118 id. 211; *Chicago v. Stock Yards Co.* 164 id. 232; *Miller v. Mayor*, 109 U. S. 394; *Railway Co. v. Peuser*, 190 Ill. 70; Wood on Nuisances, (3d ed.) 94.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is a suit brought by the city of Chicago, appellant, against the Chicago and Oak Park Elevated Railroad Company, appellee, in the municipal court of Chicago, to recover penalties for 304 alleged violations of an ordinance of the city of Chicago.

Appellee in 1890 was authorized by an ordinance of the city of Chicago to construct an elevated railroad in Lake street, in that city, from Wabash avenue to Fifty-second avenue, which was then the western limit of the city. At that time the corporate name of the appellee was "The Lake Street Elevated Railroad Company." The road so authorized was shortly thereafter constructed by appellee. December 19, 1898, the town of Cicero passed an ordinance by which it authorized the Cicero and Harlem Railroad Company to construct a railroad from Fifty-second avenue (which should connect with the road of appellee at that point) to Harlem avenue, in Oak Park. That ordinance provided that the road should descend by gradient from Fifty-second avenue to Willow avenue and thence from Willow avenue to Harlem avenue as a surface railroad, with tracks supported on ties, and further provided: "Said tracks shall be laid west of Willow avenue on Lake street and South boulevard with such rails and in such manner that carriages and other vehicles can easily and freely cross the same at street intersections without obstruction, and shall at all street crossings restore the grade and pavement to as good a condition as the same were before the laying of said tracks." This road was constructed in conformity with the provisions of the ordinance and was then purchased by the Lake Street Elevated Railroad Company. To secure the funds necessary to purchase this road the Lake

Street Elevated Railroad Company issued its bonds to the amount of \$1,275,000. Since 1901 this road has been operated as part of the continuous line of the road, extending on Lake street from Wabash avenue to Harlem avenue, in Oak Park, a distance of nine miles. In 1903 the territory west from Fifty-second avenue to Austin avenue on the line of this railroad,—a distance of one mile,—was annexed to the city of Chicago and Austin avenue became the western city limit. Between Fifty-second avenue and Austin avenue the road intersects eight north and south streets. From Fifty-second avenue west the road of appellee is paralleled by the road of the Chicago and Northwestern Railway Company, a steam railway, the right of way of the railway company extending along the north line of Lake street and South boulevard. By the said ordinance of the town of Cicero it was provided that the tracks of the Cicero and Harlem Railroad Company should be placed on the north thirty-two feet of the street for a part of the distance and on the north twenty-eight feet of the street for the remainder of the route, and permitted the building of a double-track railway. In 1906 the city council of the city of Chicago passed an ordinance requiring the appellee and the Chicago and Northwestern Railway Company to elevate their road-beds and tracks as far west as Austin avenue. This ordinance required the acceptance of each company within ninety days after its passage before it should become effective as to such company, and provided by its terms that in case it was not so accepted the ordinance should be considered null and void as to the company not accepting. The Chicago and Northwestern Railway Company accepted this ordinance, but appellee declined to do so. The steam railway company thereupon proceeded to elevate its road-bed and tracks as far west as Austin avenue, which work was completed in 1909. The road-bed was enclosed on both sides by a concrete retaining wall twenty feet high, built on the boundary lines of the right of way. The road-bed is car-

ried over the intersecting streets by bridges, supported by abutments built along the east and west boundaries of the streets. The north rail of the appellee's north track, from Willow avenue to Austin avenue, runs parallel with and is about nine feet south of the south retaining wall of the Chicago and Northwestern Railway Company. Another ordinance was passed by the city of Chicago requiring appellee to elevate the plane of its tracks between Fifty-second avenue and Austin avenue. This ordinance also provided that it should become effective from and after its passage, and provided that it should be null and void unless appellee accepted its terms within sixty days after its passage. The appellee declined to accept this ordinance. Thereafter, on November 22, 1909, the ordinance here involved was passed. The first section of the ordinance is as follows:

"Paragraph 1. That no person or corporation shall propel, or cause to be propelled, any single car or train of cars on any track or tracks situated on the surface of any street in the city of Chicago, across an intersecting street, when the track or tracks on which such single car or train of cars is or are propelled run parallel to the tracks of any steam railroad the tracks of which are elevated on an embankment and are carried over intersecting streets by a bridge or bridges, where the condition is such that any rail of said surface track is within fifteen (15) feet of the end of any abutment wall supporting said bridge or bridges.

"Paragraph 2. It is hereby declared to be a nuisance for any person or corporation to operate a single car or train of cars in violation of the foregoing paragraph."

The second section provides for a fine of not less than \$5 nor more than \$25 for each violation of the ordinance, and provides further that every single car or train of cars operated in violation of the ordinance shall be deemed a separate offense. It was admitted that if the ordinance was held valid there had been 304 violations of the same and that judgment should be entered accordingly. On a

hearing the municipal court of Chicago entered judgment for the defendant, and the case is brought to this court upon a certificate of the trial judge that it is a case where the validity of a municipal ordinance is involved, and that in his opinion public interest requires that an appeal be allowed directly to this court.

The contention of appellee in the court below, and its contention here, is, that as to it this ordinance is invalid because it impairs the obligation of the contract between it and the town of Cicero; that it deprives it of property without compensation, and is not a valid exercise of the police power of the city. Appellant contends, on the other hand, that the ordinance on which the suit is founded in effect requires track elevation; that it is neither unreasonable nor unconstitutional, and is one which the city had authority to pass.

This ordinance is in no sense one requiring track elevation. It does not pretend to permit the separation of the grade of the railroad tracks from the grade of the street, either by elevating or depressing the road-bed and tracks of the railroad. It provides simply for the removal of the tracks of any railroad company which are lying parallel with the tracks of any elevated steam road and within fifteen feet of the end of any abutment wall supporting the bridge or bridges which carry the elevated tracks over any intersecting street. So far as the terms of this ordinance alone are concerned, track elevation on the part of appellee is not contemplated or permitted.

Appellant urges that appellee can avoid the destruction of its north track under this ordinance by complying with one of the ordinances heretofore passed requiring appellee to elevate its tracks between Fifty-second and Austin avenues, and refers to those ordinances as though the same were still in force and effect. Each of those ordinances by express terms provided that it would become operative only upon the acceptance of its terms by appellee within a speci-

fied time, and in case appellee should fail to so accept it, that it would become null and void. As appellee declined in each instance to accept the terms of these ordinances they never became effective, and appellee is in the same position toward the city of Chicago as though no such elevation ordinances had ever been passed.

Under the ordinance passed by the town of Cicero, the Cicero and Harlem Railroad Company was granted the right to construct a railroad, consisting of two tracks, from Fifty-second avenue to Harlem avenue over a specified portion of the streets indicated. This ordinance provided that that company should operate a surface railroad under the grant, and specified the manner in which its tracks should cross the intersecting streets and the condition in which such crossings, including the grade of the street and the pavement, should be left after the building of the road had been completed. The road was built under this ordinance and was afterwards sold to the appellee for a large sum of money and has been operated as a double-track surface railroad since the time of its completion. The evidence shows that appellee runs 296 trains daily to Austin avenue and that these trains carry 50,000 passengers. There was no dispute as to any fact. The evidence further discloses that the removal of the north track to a distance of fifteen feet from the abutment of the bridges over the eight intersecting streets between Fifty-second and Austin avenues, which abutments are on the north line of appellee's right of way of thirty-two feet, would leave but seventeen feet for appellee's use, and that two tracks could not be used in that space. To comply with this ordinance appellee would be limited to one track for the operation of its road between Fifty-second and Austin avenues, which it is not denied would seriously impair the operation of the road and its revenue.

The contention of appellant is, that the conditions existing at the eight street crossings between Fifty-second and

Austin avenues are so dangerous that the passage and enforcement of this ordinance is a proper exercise of its police power to insure the safety of the public. It is shown by the evidence that at each of the street crossings in question appellee has voluntarily installed and maintains gates, at which signal bells are rung automatically on approach of trains and lights put on, which continue to burn while the bells are ringing. A flag is also displayed at the time, which indicates whether the gate is up or down. These gates are located between the abutments and the north track of appellee and are about three feet from the retaining wall and abutments. The arms of the gates, when lowered, extend across the full width of the street and the sidewalk. During four hours of each day, which are referred to as rush hours, (two hours in the morning and two hours in the evening,) trains are run over this territory every three minutes and at times at the rate of one every minute and a half. During the time that these conditions have existed at the eight street crossings in question, since the elevation of the tracks of the Chicago and Northwestern Railway Company, but two accidents are shown to have occurred at any of these crossings,—one to a policeman on duty at one of the crossings and one in which a milk-wagon was struck. The mere fact that these crossings may be dangerous is not sufficient to authorize the city to deprive appellee of its right to use South boulevard and Lake street under its contract originally made with the town of Cicero. That ordinance granted to the assignor of appellee permission and authority to lay its tracks on the north thirty-two feet of South boulevard and Lake street and to use them for the purposes for which they are being used. The privilege of the use of the public streets of the city or town, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a

mere license and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust. (*Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42; *City of Belleville v. Citizens' Horse Railway Co.* 152 id. 171; *People v. Blocki*, 203 id. 363.) This ordinance is, in effect, an attempt to revoke the license of appellee to use the street under the terms of the ordinance giving it that permission. The grant by the town of Cicero, and by which the city of Chicago is bound, was accepted and acted upon in a substantial manner by appellee and its assignor and now constitutes a contract binding and obligatory upon appellant and appellee, which cannot be arbitrarily broken. The city of Chicago undoubtedly has the right, in the exercise of its police power, to regulate the use by appellee of its tracks and cars in a reasonable manner, but it cannot, under the pretense of regulation, deprive the appellee of its property or of any of its essential rights and privileges acquired under the contract with the town of Cicero. *City of Chicago v. Jackson*, 196 Ill. 496; *City of Belleville v. Turnpike Co.* 234 id. 428; *Venner v. Chicago City Railway Co.* 246 id. 170.

It cannot be contended that by this ordinance appellant is attempting in any manner to regulate the use by appellee of its tracks and cars, and, indeed, counsel for appellant frankly admit that such is not the purpose of the ordinance and insist that the ordinance is one requiring elevation. As has been pointed out, this ordinance cannot be regarded in any sense as an elevation ordinance, and as its only purpose is to require the removal of the tracks of such railroad companies as are situated as is appellee, it is such an infringement upon the rights of appellee as renders the ordinance invalid as to it. The right of the city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the con-

ducting of a lawful business or to suppress entirely the use of property. *Town of Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *City of Chicago v. Gunning System*, 214 id. 628.

It is contended by appellant that it has the power to declare such a situation as is here presented to be a nuisance and to suppress the same. Appellee is conducting its business in accordance with the grant made originally by the town of Cicero. It constructed its road by authority of law, and is operating it, under the terms of the grant, for the accommodation of the public. The city cannot, by a mere declaration, show the operation of the appellee's road through the territory in question to be a nuisance and subject its tracks to removal. The public welfare demands that there should not be a discontinuance of the operation of an authorized railroad. *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *Chicago and Eastern Illinois Railroad Co. v. Loeb*, 118 id. 203.

Appellant complains of the refusal of the court to hold as law fifty-seven propositions submitted by it, and of the action of the court in holding as law eighteen propositions submitted by appellee. Many of the propositions submitted by appellant were abstract propositions of law and were correct but were not applicable to the questions involved here. We have not made a critical examination of all these propositions of law as to the refusal or holding of which error has been assigned, as the judgment of the court below was clearly proper even though there may have been error in the action of the court in passing upon some of the propositions submitted.

For the reasons stated the ordinance in question, as applied to the tracks of appellee from Fifty-second avenue to Austin avenue, in the city of Chicago, is invalid, and the judgment of the municipal court is affirmed.

Judgment affirmed.

B. F. SLENKER, Appellant, vs. ED C. ENGEL, Appellee.

Opinion filed June 20, 1911.

1. ELECTIONS—*ballot cannot be counted if no effort was made to comply with the law.* While the intention of the voter should be given effect when it is possible to do so without nullifying the statute, still there must be an honest effort by the voter to observe the law and to express his intention in accordance therewith.

2. SAME—*single line in circle is not sufficient.* A ballot having but a single line at the head of the ticket cannot be counted for candidates on that ticket, there being no crosses marked in the squares opposite their names.

3. SAME—*when a ballot cannot be counted for either candidate.* A ballot having the figures " $\frac{1}{2}$ " distinctly marked in the squares opposite the names of the republican and democratic candidates for a county office cannot be counted for either candidate, although a cross is marked in the circle at the head of one of those tickets.

4. SAME—*a cross after name of candidate is not sufficient.* A ballot having no mark in the circle at the head of any ticket or in any of the squares but having crosses marked after the names of certain candidates cannot be counted, as the ballot does not show any attempt to comply with the law.

5. SAME—*mark placed upon ballot by election officers is not a distinguishing mark.* A distinguishing mark is one placed upon the ballot by the voter by which it may be identified, and a mark placed on the ballot by the election officers, either before or after the ballot is voted, is not such a distinguishing mark as requires the exclusion of the ballot on the count.

6. SAME—*the erasure of certain names on ballot is not a distinguishing mark.* The erasure of the names of certain candidates by drawing pencil lines through them is not such a distinguishing mark as precludes the counting of the ballot for candidates properly voted for and whose names are not erased.

7. SAME—*figures placed on ballot during the count are not distinguishing marks.* Figures placed upon ballots by some person other than the voter, apparently by the election officers during the count of the ballots after the election, are not distinguishing marks.

8. SAME—*cross appearing by mere indentation of paper is sufficient.* A ballot having no mark except a cross plainly indented in the paper in the circle at the head of one ticket, having apparently been made with a broken pencil or some hard substance leav-

ing no color on the paper, is properly counted as a straight vote for that ticket.

9. SAME—*ballot blurred by being fed through the press twice should be counted if properly marked.* Where a ballot is blurred by being fed through the press twice the ballot may properly be thrown out by the judges as a spoiled ballot before it is voted, but if it is properly endorsed by the judges and marked by the voter it should be counted.

10. SAME—*when a ballot with portions of the circles missing should be counted.* In a contest between the republican and democratic candidates for a county office, if the republican and democratic tickets are perfect and the ballot is properly marked for one of those candidates it should be counted for him, even though portions of the circles at the head of two other tickets on the ballot are missing, as the result of not properly placing the paper on the printing press.

11. SAME—*when ballot should not be rejected as having a distinguishing mark.* A ballot having the initials "W. M. C." on the back, apparently made by one person, should not be rejected as having a distinguishing mark, where one of the judges endorsed many of the ballots with the initials "W. M.," although he testified that he did not know how the "C" came to be on the ballot.

12. SAME—*cross in circle is sufficient if lines intersect within the circle.* A cross in the circle is sufficient if there is a point within the circle where the lines intersect, even though there are a number of marks in the circle indicating that the voter was nervous and unable to make a straight line.

13. SAME—*when marks in square are sufficient.* A mark in the form of the capital letter "T" in the square opposite a candidate's name is sufficient; and so also is a cross in the square which has one line much shorter than the other.

14. SAME—*when figures placed by voter on ballot are not distinguishing marks.* Ballots properly marked for a candidate for a county office should be counted for him, even though the voters, in attempting to divide or cumulate their votes for candidates for the legislature, placed figures in the squares opposite their names or after the names, and, in one instance, before the name of a candidate for trustee of the University of Illinois.

15. SAME—*blur resulting from attempt to erase cross in square is not a distinguishing mark.* A blur over the square in front of a candidate's name, resulting from an attempt by the voter to erase the cross after changing his mind and voting for the other candidate, is not a distinguishing mark and the ballot should be counted for the candidate voted for.

16. SAME—*ballot having no initials of any judge endorsed on it cannot be counted.* A ballot having only one letter of the judge's initials endorsed upon it may be counted, but ballots having no initials of any judge endorsed upon them are not in compliance with the statute and cannot be counted for anyone.

CARTER, C. J., and DUNN, J., dissenting.

COOKE and FARMER, JJ., specially concurring.

APPEAL from the County Court of Woodford county;
the Hon. JOHN H. GILLAN, Judge, presiding.

SIGMUND LIVINGSTON, and ORMAN RIDGELY, for appellant.

E. J. RIELY, and J. A. RIELY, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

At the election held November 8, 1910, in Woodford county, Ed C. Engel was the democratic candidate for county treasurer and B. F. Slenker was the republican candidate for said office. The election returns showed that Engel received 2126 votes and that Slenker received 2077 votes for county treasurer, and George Shuman, candidate on the prohibition ticket for said office, received 42 votes. A certificate of election was issued to Engel, and Slenker filed a petition in the county court of said county to contest the election, making Ed C. Engel the sole defendant. A motion was made and overruled to dismiss the petition because Shuman was not made a party defendant. A recount of the ballots was entered upon before the county judge of Woodford county, but before the count was completed the judge's term of office expired and a change of venue was granted to the Hon. John H. Gillan, judge of the county court of Iroquois county. When the cause was transferred to Judge Gillan he proceeded to hear it *de novo* and all of the proceedings had before the other judge seem to have been disregarded. All of the rulings complained

of, including the motion to dismiss for want of proper parties, are in the record as made before Judge Gillan. Upon a re-count of the ballots, after all objections to disputed ballots had been disposed of, the court found that Engel had received 2114 votes, Slenker 2112 votes and Shuman 46 votes, and that there were 181 votes which should not be counted for either of the contestants. The court entered an order declaring Engel duly elected, to which Slenker preserved exceptions and by his appeal has brought the record to this court for review.

Appellee has assigned no cross-errors upon the record, hence the ruling of the court upon the motion to dismiss for want of proper parties is not presented for our consideration.

The only errors complained of by appellant are based on rulings of the court upon certain disputed ballots. He contends that certain ballots were excluded which should have been counted for him, and that certain other ballots were erroneously counted for appellee. The original ballots have been properly certified and sent up with the record for our inspection.

Appellant contends that ballot "Exhibit A," in Green township, should have been counted for him and that the court erred in rejecting the same. The ballot has one heavy line drawn through the center of the republican circle, made with an indelible blue pencil. There is nothing in the republican circle that resembles a cross of any character. The one heavily-shaded line drawn from the top to the bottom of the republican circle is the only trace of a mark to be found upon the republican ballot. In the squares opposite the names of the democratic candidates for sheriff and county clerk are blue pencil marks, indicating that the voter desired to vote for those candidates on the democratic ticket. There are no other marks of any kind or character anywhere to be found upon said ballot. Appellant contends that there is a cross in the republican circle and that the

same can be seen under a magnifying glass, and that therefore the ballot should be counted for him. We are wholly unable to discover the slightest trace of any mark or line in the republican circle except the one heavy line above described. There is no evidence of any attempt on the part of the voter to comply with the law by making a cross in the circle. This ballot was properly rejected by the court.

Ballot "Exhibit 1-A," voted in Olio precinct No. 1, was rejected by the court and appellant complains of this ruling. That ballot is marked with a distinct cross in the republican circle. There are also crosses in the squares on the republican ballot opposite the names of the candidates for county judge, county clerk and county superintendent of schools, and a cross in the square opposite the name of one of the democratic candidates for representative in the General Assembly. In the squares to the left of the names of appellant and appellee, and also in the squares opposite the republican and democratic candidates for sheriff, are the figures " $\frac{1}{2}$," made with a blue indelible pencil similar in appearance to the other markings on the ballot. It can not be said that the voter attempted to make a cross in these four squares, since the figures " $\frac{1}{2}$ " are very carefully and accurately written. In each instance the slanting line that separates the figures of the fraction is drawn entirely through the square. The only conclusion that we can arrive at from an inspection of this ballot is that the voter desired to divide his vote equally between the two sets of opposing candidates, and he attempted to carry out this intention by writing the fraction " $\frac{1}{2}$ " in the squares opposite the names of the respective candidates. This, of course, he had no legal right to do. We think that these figures sufficiently indicate that the voter did not intend to give appellant his entire vote, and since he had no right to divide it and give him a part of it, it could not properly be counted as a vote for appellant.

"Exhibit P," being a ballot cast in El Paso precinct No. 3, was not counted for appellant and this ruling is complained of. That ballot has no marks of any kind or character in any of the circles or squares upon it. It has a cross after the name of appellant and crosses after the names of two other candidates on the republican ticket. Appellant contends that this indicates an intention on the part of the voter to vote for him. The law requires the voter to indicate his choice by making a cross either in the circle at the head of his party ticket or in the squares opposite the names of the persons for whom he desires to vote. It is not sufficient to make a cross after the name of the candidate and entirely outside the square. It is not true that because we may be able to guess at what the voter intended, the law requires that his ballot should be counted. While the intention of the voter should be given effect when it is possible to do so without nullifying the statute, still there must be an honest effort on the part of the voter to observe the law and to express his intention in accordance with its requirements. The statute was entirely disregarded by the person who cast this ballot, and it was not error to refuse to count it for anyone.

The foregoing are the only ballots rejected by the court of which appellant makes complaint. He complains of a number of ballots that were counted for appellee. These will be considered.

"Exhibit 1," being a ballot cast in Clayton precinct, was counted for appellee over appellant's objection. The objection to this ballot is that it has the letter "B" in pencil on the back of the ballot. It is claimed that this ballot should be rejected because the letter "B" is a distinguishing mark. We do not agree with this contention, for the reason that we are convinced, from a comparison of the letter "B" with the initial of one of the judges, that the letter "B" was written, not by the voter but by the judge of the election, whose initials are "B. N." It is not un-

reasonable to suppose that the judge, before handing out the ballot, started to place his initials on it and wrote the "B," and then discovering that he was not placing the letters at the proper place, wrote "B. N." under the official endorsement and opposite the words "Judges' initials." The probability that this accounts for the presence of this letter on the back of the ballot is greatly strengthened by the striking similarity of the letter "B" on the back of the ballot with the same letter on this and other ballots evidently endorsed by the same judge. A distinguishing mark is a mark placed upon the ballot by the voter by which his ballot can be identified. A mark placed upon a ballot by the election officers, either before or after the ballot is voted, is not a distinguishing mark within the rule which requires ballots having such marks upon them to be excluded from the count. The ballots to which objections were sustained in *Winn v. Blackman*, 229 Ill. 198, are distinguishable from this ballot, in that ballots 164 and 117 in the *Winn case* had letters upon them which appeared to have been placed there by the voter and not by the election officials.

"Exhibit 31" is a ballot cast in Minonk precinct No. 2, and was counted for appellee over appellant's objection. This ballot is a straight democratic ballot voted with a cross in the circle, except that the voter voted by a cross in the square for the republican candidate for county clerk and erased the name of the democratic candidate for county clerk by drawing pencil lines through it. There are in black pencil the figures "25" to the left of the square opposite the name of the democratic candidate for county clerk. These figures and the erasure of the name of the democratic candidate for county clerk are thought to constitute distinguishing marks which ought to cause the rejection of the ballot. We cannot assent to this. In *Parker v. Orr*, 158 Ill. 609, it was held that a ballot which was properly marked with a cross and a circle, and on which

the voter had erased the names of some of the candidates, was a good ballot and should be counted for those persons whose names were not erased on the ballot voted. The method employed by the voter was manifestly for the purpose of emphasizing his intention to vote for the opponent of the candidate whose name is erased. This being the reasonable conclusion as to the voter's purpose in erasing the name, it ought not to be held that it was done for the unlawful purpose of distinguishing his ballot. The presence of the figures "25" on the margin of the ballot, when considered in connection with other ballots upon which figures appear, leads us to the conclusion that these figures were placed there by some person other than the voter,—most probably some of the election officers during the counting of the ballots. There are quite a number of ballots on which figures appear, some of them on the face of the ballot and others on the back. They are not consecutive numbers, and appear to have been made in every instance, with one exception, with a black pencil, while the markings on the face of the ballots by the voter were done with a blue indelible pencil. We do not think these figures should be held to be distinguishing marks.

Ballots in Minonk precinct No. 3, "Exhibit No. 1," in Minonk precinct No. 2, "Exhibits Nos. 35, 30 and 34," and in Metamora precinct, "Exhibits Nos. 23 and 24," were all objected to because they had figures upon them, either upon the back or face thereof, and are all disposed of by what has been said in reference to Minonk precinct No. 2, "Exhibit 31."

"Exhibit A," Kansas precinct, is a ballot objected to because there is no cross or other mark in the circle or in any of the squares. This is a straight democratic ballot and has a distinct cross in the democratic circle, but it appears to have been made with a broken pencil or with some hard substance that did not leave any color on paper. The cross, however, is very clearly to be seen, and while it is

merely made by indentation of the paper, the ballot was properly counted for appellee.

"Exhibit A," in Linn township, is a ballot which is printed double by having been fed through the printing press twice. The two impressions are not precisely in the same place, and it gives the ballot a peculiar, blurred appearance. It is a ballot that the judges of the election might reasonably have refused to give out as being a spoiled ballot, but it was given to a voter properly endorsed and is voted with a cross in the democratic circle, being a straight democratic vote, except the voter voted for the republican candidate for county judge by marking a cross in the square opposite that candidate's name. The voter has observed the law and clearly expressed his intention. It is very apparent how the ballot happened to be in the condition it is and that the voter was in no way responsible for it. We think this ballot was properly counted for appellee.

"Exhibit P," Montgomery township, is a ballot that has a portion of the circles above the socialist and socialist-labor tickets not printed in full, caused by the paper not being properly placed in the printing press. There is about one-half of the circle of the socialist-labor ticket, which was the last ticket on the ballot, and about two-thirds of the circle on the socialist ticket, that still remain on the ballot. The prohibition, republican and democratic ballots are perfect. This ballot is objected to by appellant. The portion of the ballot cut away does not in any way affect the republican or democratic ballots, both of which are perfect. The ballot is a democratic ballot voted for all of the candidates on the democratic ticket except the candidate for sheriff, which is left blank, and a cross is placed in the square opposite the name of the republican candidate for sheriff. This ballot was properly counted for appellee.

Ballot "Exhibit A," in Palestine precinct, is objected to because the initials "W. M. C." are on the back of the ballot, and the proof is that no judge of the election in

that precinct had such initials. One of the judges in that precinct who endorsed his initials on many of the ballots used the letters "W. M." He testifies that he does not know how the "C." happened to be on the ballot. The three letters are made with a blue indelible pencil and appear to have been made by the same person. There is no reason to suspect that the voter placed the "C." after the judge's initials "W. M.," and hence no reason for holding that the ballot has a distinguishing mark on it.

"Exhibit A," Olio precinct No. 2, is a ballot objected to because there is an insufficient cross in the democratic circle. There are a number of pencil marks in the democratic circle, but we think that there is a sufficient cross to warrant the court in counting the ballot. The marking of the ballot indicates that the voter was nervous and unable to make a straight line, but there is a point in the circle where two pencil marks intersect and cross. The ballot was properly counted for appellee.

"Exhibit G," in Olio precinct, is a ballot objected to for the reason that there is no cross in the square opposite appellee's name. The cross here is in the form of a capital letter "T," which has been held to be sufficient by this court in *Parker v. Orr, supra*, and *Winn v. Blackman, supra*.

Ballot designated "Exhibit A," in Montgomery township, is objected to because of insufficient marking in the democratic circle. The cross in the democratic circle is distinct and complies with the requirements of the law.

"Exhibit P," Cazenovia precinct No. 1, is a ballot objected to for insufficient marking. This is a democratic ballot voted by marking in the squares opposite the names of the several candidates, except that the voter voted for John A. Sterling for Congress. The cross in the square in front of appellee's name is sufficient. There is a distinct crossing of the lines near the center of the square, although one line is much shorter than the other. The ballot was properly counted for appellee.

"Exhibit 2-A," Olio precinct No. 1, is a ballot objected to because the voter wrote the figure "3" in the square opposite the name of Ella S. Stewart, who was a candidate for trustee of the University of Illinois on the prohibition ticket. There were three trustees to be elected, and evidently the voter supposed he could cumulate his votes on one candidate and took this method of attempting to do so. This affords no reason for rejecting the ballot. The ballot in other respects is free from objection and was voted for appellee and properly counted for him.

"Exhibit 3-A," Olio precinct No. 1, is a ballot similar to the one that has just been considered. The figure "3" is in the square before the name of one of the candidates for the legislature. It is clear that the voter was simply intending to cast three votes for that particular candidate for representative.

There are five other ballots that are objected to because the voter tried to indicate how he desired to distribute his votes among the candidates for the legislature. The objection made to all of these ballots is, that these figures, either placed in the square or in some instances after the name of the candidate, are distinguishing marks. The observations already made sufficiently show that these figures were made by the voter to indicate how he desired to distribute his votes among the candidates for the legislature.

"Exhibit B," being a ballot in Montgomery township, is objected to because of an attempt to erase a cross in the square opposite appellant's name. It is contended that this constitutes a distinguishing mark. All the candidates on the republican ticket appear to have been voted for by marking crosses in the squares opposite their respective names. The voter then undertook to erase the cross in the square opposite appellant's name, and in so doing has distributed the blue color in a blur over the square. There is a distinct cross in the square opposite appellee's name. The reasons for the appearance of this ballot are perfectly

apparent. It is simply a case of the voter changing his mind after marking his ballot for appellant and then voting for appellee. The ballot was properly counted for appellee.

Ballot "Exhibit B," in Palestine precinct, is objected to. It is a straight democratic ballot marked with a cross in the democratic circle, with the exception that the voter voted for a republican for member of the legislature and a republican for sheriff, and also marked his ballot for the prohibition candidate for county treasurer, and then erased, or attempted to erase, the cross in the square before the name of the prohibition candidate for treasurer and left his ballot a straight democratic ballot, with the exception of the member of the legislature and sheriff. This ballot is substantially like the preceding one in Montgomery township.

Ballot "Exhibit 2," from Clayton precinct, is objected to because it only has one letter of the judge's initials on it. This has been held to be sufficient.

Ballots "A" from Cazenovia precinct No. 1, "E" from Olio precinct No. 2, and "D" from Olio precinct No. 2, were all republican ballots marked for appellant, and were rejected by the court because there was no endorsement of the initials of any judge on any of them. This question came before this court first in the case of *Kelly v. Adams*, 183 Ill. 193, and it was there held that a ballot not officially endorsed by a judge of the election could not be counted. It was said in that case, on page 195: "The absence of the official endorsement would have been sufficient cause for the rejection of this ballot." The same question again arose in *Caldwell v. McElvain*, 184 Ill. 552, where the ruling of the court below in refusing to count for either party ballots which did not have the initials of a judge endorsed thereon was affirmed. And again in the case of *Choisser v. York*, 211 Ill. 56, the question arose as to the effect of using a rubber stamp instead of endorsing the initials of the judge on the ballot in his handwriting, and the doctrine

of the previous cases was re-affirmed and the statute requiring the endorsement of the initials of one of the election judges was held to be mandatory, and that a ballot not so endorsed should not be counted. The same question was again before this court in *Winn v. Blackman, supra*, and it was held there that ballots which did not contain the initials of any of the judges on the back of them were properly rejected. These cases must be regarded as establishing the rule in this State that a ballot which does not contain the initials of any of the judges of the election is not an official ballot and cannot be counted for anyone.

Finding no error in this record the judgment of the county court is affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE CARTER, dissenting:

I do not concur in the foregoing opinion on one point. In my judgment the three ballots that did not contain the endorsement of the initials of the judges should be counted. The court, in *Choisser v. York*, 211 Ill. 56, after reviewing the authorities in this State on the question, said that ballots not having the initials of the judges of election endorsed thereon could not be counted, "in the absence of evidence tending to show fraud and mistake on the part of the judges." I am of the opinion from this record that these three ballots were cast by legal voters and the judges inadvertently omitted their initials on the back. A voter should not be deprived of his vote by a mistake of election officers where he is not at fault, and the ballot itself, or other evidence in the record, shows that the ballot is genuine, delivered by the judges to the voter and by him voted, and that the lack of the judges' initials was caused by mistake. The initials of a judge in his handwriting are for the purpose of identifying the ballot, but if the ballot can be fully identified, even in the absence of the initials, and it is shown that it was cast by a legal voter, it should be

counted. This conclusion, I think, is in harmony with the decisions heretofore rendered by this court.

Mr. JUSTICE DUNN, also dissenting.

COOKE and FARMER, JJ., specially concurring:

We concur in the result reached and in all that is said in the opinion except the holding and discussion in reference to the ballot "Exhibit 1-A," in Olio precinct No. 1. The statute does not permit any splitting or division of a vote between the candidates for sheriff and the candidates for treasurer. The voter is presumed to know the law, and to know, therefore, that he could not legitimately mark his ballot in the way in which this ballot was marked. In our opinion the figures " $\frac{1}{2}$ " in the four squares indicated constitute distinguishing marks, and this ballot should be thrown out and not counted for any candidate.

THE CITY OF CHICAGO, Appellee, vs. MARSHALL S. MARSH
et al. Appellants.

Opinion filed June 20, 1911.

1. SPECIAL ASSESSMENTS—*an assessment roll is prima facie evidence of amount of benefits.* The assessment roll is *prima facie* evidence that the property is benefited to the extent of the assessment, on the true legal theory.

2. SAME—*basis of assessment is the enhanced market value of the property.* The basis of a special assessment is the enhanced market value of property, and the benefit or detriment to the occupant of the premises in his business cannot determine that question, though it may be proper for consideration in determining it.

3. SAME—*what does not show that sidewalk will be a detriment instead of a benefit.* The fact that the property along which a sidewalk is to be built is used for heavy manufacturing purposes, and that there are several crossings for teams which will be interfered with and be likely to cause injury to pedestrians, who will be attracted in greater numbers if the sidewalk is built, does not show that the sidewalk will be a detriment and not a benefit.

APPEAL from the County Court of Cook county; the Hon. FRANK G. PLAIN, Judge, presiding.

MONTGOMERY, HART & SMITH, for appellants.

GEORGE A. MASON, and WILLIAM T. HAPEMAN, (EDWARD J. BRUNDAGE, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal from the confirmation of a special assessment for a cement sidewalk six feet wide on Elston avenue, in the city of Chicago. A reversal is asked upon the ground that the property of appellants is assessed more than it will be benefited by the proposed improvement.

The appellants' property is situated on the east side of Elston avenue, bounded on the south by the elevated right of way of the Chicago and Northwestern railway and on the easterly side by the north branch of the Chicago river. It has docks on the river and switch tracks connecting with the railroad. Elston avenue in front of the property is a granite-paved thoroughfare. The neighborhood is devoted almost wholly to manufacturing and jobbing in heavy materials. The appellants' property being the only property in the vicinity having combined water and rail shipping facilities and abutting upon a street mainly used for heavy teaming, is especially adapted for heavy manufacturing or jobbing in such materials as iron, coal and lumber, and is now devoted to those uses. The surface of the property is from two to five feet below the level of Elston avenue. A high board fence extends along the entire front of the property next to the sidewalk. There are three team openings in the fence, through which heavy traffic is constantly moving. The appellants introduced testimony that the improvement would not benefit the property but would injure it by attracting many more pedestrians to that side of the

street, who would be in the way of the teaming and would be a nuisance and bother and would be getting hurt; that the walk, if built as proposed, would naturally crack and break and leave bad places; that the ordinance provided for no retaining wall, and the weather would cause the walk to settle and break; that it would be injured by reason of the heavy traffic across it, and that no cement sidewalk could stand the strain of this heavy hauling. The appellee's superintendent of sidewalks testified that in his opinion the property would be benefited not less than two dollars a front foot.

The basis of the appellants' objections is, that the increased use by the public of the sidewalk will interfere with the use of it by appellants' tenants, and thus be a detriment instead of an advantage to the business conducted on their property. This view cannot be accepted as conclusive evidence that the property itself would receive no benefit from the proposed improvement. The basis of the assessment is the enhanced market value of the property. The benefit or detriment to the occupant of the premises in his business cannot determine that question, though it may be proper for consideration in forming a judgment. (*Clark v. City of Chicago*, 229 Ill. 363; *Jones v. City of Chicago*, 206 id. 374.) The assessment roll was *prima facie* evidence that the property was benefited to the extent of the assessment on the true legal theory. (*Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544.) We cannot say that this evidence was overcome by the testimony on behalf of appellants or that the judgment is palpably against the weight of the evidence. The judgment must therefore be affirmed. *Clark v. City of Chicago*, 214 Ill. 318; *Morton v. City of Chicago*, 228 id. 201.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOHN TIERNEY, Plaintiff in Error.

Opinion filed June 20, 1911.

1. WORDS AND PHRASES—word “impleaded” is not synonymous with the expression “et al.” The word “impleaded” is not synonymous with the expression “et al.,” but when used in formal pleadings or court records, following the name of a defendant who has appeared, means that there are other defendants but that only the defendant named is in court.

2. CRIMINAL LAW—when the record shows that named defendant was arraigned. An order entitled in the name of the People against a named defendant, “impleaded,” following which is a recital that the defendant comes in person and by counsel and “he being now here duly arraigned,” etc., sufficiently shows that the named defendant personally appeared and was arraigned, and not merely that some one of the several defendants was arraigned.

3. SAME—entire record will be searched in determining sufficiency of verdict. In determining the sufficiency of a verdict and a judgment of conviction based thereon, the entire record will be searched and all parts interpreted together, and a deficiency at one place may be cured by what appears in another.

4. SAME—verdict should be liberally construed. A verdict is not to be construed with the same strictness as an indictment but is to be liberally construed, and all reasonable intendments will be indulged in its support, and it will not be held insufficient unless, from necessity, there is doubt as to its meaning.

5. SAME—indictment need only set out former conviction in apt words. Under the Habitual Criminals act the indictment need only set out the former conviction in apt words, and where this is done by charging conviction for a certain robbery, and the evidence is not incorporated in the record, a court of review will presume that the trial court confined the evidence to the proper issues, and that the finding of the jury that the defendant had been “convicted of robbery and had served a term in the penitentiary,” etc., refers to the robbery charged in the indictment.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. GEORGE KERSTEN, Judge, presiding.

CHARLES E. ERBSTEIN, for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and FRED H. HAND, (GEORGE GUENTHER, of counsel,) for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

The grand jury of Cook county, at the February term, 1909, returned into the criminal court of said county an indictment containing four counts, charging John Tierney, Joseph Brocki and John Rudinek with the crime of robbery. A plea of not guilty was entered and a conviction upon a trial before a jury was had, and the defendants were sentenced to the penitentiary for an indeterminate period. John Tierney has alone sued out a writ of error.

No bill of exceptions has been incorporated into the record and but two reasons are urged in this court as grounds of reversal: (1) That it does not appear from the record that the plaintiff in error was arraigned; and (2) that the verdict returned by the jury is not sufficient to support the judgment.

The first count of the indictment charged that the plaintiff in error and Joseph Brocki and John Rudinek, on the 19th day of January, 1909, in the county of Cook, committed the crime of robbery by feloniously and violently taking from the person of one Elizabeth Borzek certain moneys of the value of \$48. The second count charged that the plaintiff in error was indicted on the first day of November, 1897, for the crime of robbery in Cook county by before that date feloniously and violently taking from the person of one August Freund a certain watch and other personal property; that at the time of the robbery plaintiff in error was armed with a revolver with intent to take the life of August Freund if resisted, and that certain confederates, who were armed, were present to aid and abet in the robbery, and that the plaintiff in error was convicted of such offense and was sentenced to the penitentiary, upon

such conviction, for an indeterminate period. The count also charged the same robbery of Elizabeth Borzek charged in the first count of the indictment, and that at the time of such robbery the plaintiff in error and Joseph Brocki and John Rudinek were armed with revolvers, with the intent, if Elizabeth Borzek resisted, to maim or kill her. The third and fourth counts of the indictment charge former convictions against Joseph Brocki and John Rudinek and the robbery of Elizabeth Borzek, but as Joseph Brocki and John Rudinek are not before this court further reference need not be made to the third and fourth counts of the indictment.

On the ninth day of February, 1909, the following order was entered of record in said cause:

"The People of the State of Illinois *vs.* John Tierney, (Impleaded)—Indictment for robbery, etc.—90,343.—This day come the said People, by John E. W. Wayman, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and he having been furnished with a copy of the indictment in this cause and lists of the names of the witnesses and jurors, and he being now here duly arraigned and forthwith demanded of and concerning the crime alleged against him in said indictment how he will acquit himself thereof, for a plea in that behalf he says that he is not guilty in manner and form as charged therein; and of this he puts himself upon the country and the said People do the like."

Afterwards, on the 6th day of March, 1909, the following order was entered of record in the cause:

"The People of the State of Illinois *vs.* John Tierney, Joseph Brocki, John Rudinek.—Indictment for robbery, etc.—90,343.—This day come the said People, by John E. W. Wayman, State's attorney, and the said defendants, as well in their own proper persons as by their counsel, also come; and also come the jurors of the jury aforesaid with a sealed verdict, and for their verdict say: 'We, the

jury, find the defendant John Tierney guilty of robbery in manner and form as charged in the indictment; and we further find, from the evidence, that at the time of committing said robbery he was armed with a certain dangerous weapon, to-wit, a certain revolver, with the unlawful and felonious intent then and there, if resisted, then and there to kill and maim the person so robbed; and we further find, from the evidence, that the defendant John Tierney, at the time of committing the offense, had theretofore been convicted of robbery and had served a term in the penitentiary of this State for said offense.' ”

After his conviction the plaintiff in error entered his separate motions for a new trial and in arrest of judgment, both of which motions were overruled and the plaintiff in error was sentenced to the penitentiary for an indeterminate period.

It is first contended that the record does not show upon its face that the plaintiff in error was arraigned, as it is said the order entered on the ninth day of February does not show the plaintiff in error was present in court on that day, the contention being that the word “impleaded,” appearing in the title of the case preceding the order of February 9, is equivalent to the expression “*et al.*,” and that as the record, as made up, shows that only one defendant appeared and was arraigned on that day, it cannot be certainly determined which one of defendants was arraigned on that day. The word “impleaded” is not synonymous with the expression “*et al.*,” but when used in formal pleadings and in court records the word “impleaded” is properly used following the name of a defendant when there is more than one defendant and only one defendant appears, to designate that there are defendants other than the defendant who is then present in court. In Abbott’s Law Dictionary the use of the word “impleaded” is thus explained: “Impleaded: to sue or prosecute in course of law. In actions where there are more defendants than one and one an-

swers, his name is sometimes stated thus in the title of his answer or plea: 'Richard Roe, impleaded with John Doe,' signifying that the two are sued together but one only interposed the plea." And in Anderson's Dictionary of Law the use of the word "implead" is thus explained: "Implead: to sue in due course of law, as, A impleaded with B," and it is then stated by the author, where a party is designated as impleaded with another "each defendant may then interpose his own answer."

From these expressions of the law lexicographers it is clear the record writer in this case used the term "impleaded," following the name of the plaintiff in error in the title of the case preceding the order of February 9, advisedly, and it was there stated in correct but abbreviated legal phraseology that the defendant, John Tierney, who was impleaded with other defendants, personally appeared and was severally arraigned. The contention, therefore, that the record does not show upon its face that the plaintiff in error was arraigned before he was put upon his trial cannot be sustained, as the record, when properly read, shows that the plaintiff in error appeared in open court and was formally arraigned and thereupon entered his plea of not guilty.

It is further contended that the verdict is insufficient to support the judgment of conviction, as it is said it does not show that the plaintiff in error had been previously convicted of the robbery averred in the first paragraph of the second count of the indictment, and from aught that appears in the verdict the jury may have found that the plaintiff in error had been convicted of some robbery other than that of August Freund, alleged to have been committed on the first day of November, 1897. We cannot accede to that view. The record, we think, when considered as a whole, clearly shows that the jury found the plaintiff in error to be guilty of having robbed Elizabeth Borzek in manner and form as charged in the indictment,—that is,

that he committed robbery in the aggravated form; and that previous to the commission of that offense by him he had been convicted of robbing August Freund, as charged against him in the first paragraph of the second count of the indictment,—that is, in the aggravated form. A verdict is not to be construed with the same strictness as an indictment, but it is to be liberally construed, and all reasonable intendments will be indulged in its support, and it will not be held insufficient unless, from necessity, there is doubt as to its meaning. (*People v. Lee*, 237 Ill. 272.) The rule is, that in determining the sufficiency of a verdict, and a judgment of conviction based thereon, the entire record will be searched and all parts of the record interpreted together, and a deficiency at one place may be cured by what appears at another. (*People v. Murphy*, 188 Ill. 144.) Under the Habitual Criminals act it was only necessary to set out in the indictment the former conviction of the plaintiff in error in apt words, which it is conceded was done in this case, and as the evidence heard upon the trial is not incorporated into the record, this court clearly is bound to presume, in consideration of the verdict of the jury finding the plaintiff in error guilty, and the judgment of conviction based thereon, that the trial court confined the evidence to the issues involved upon the trial, and that the finding of the jury that the plaintiff in error had been “convicted of robbery and had served a term in the penitentiary of this State for such offense,” referred to the previous robbery charged in the first paragraph of the second count of the indictment, and not to some other robbery which was entirely foreign to the issues involved in the trial of the case then on hearing before the court and jury.

Finding no reversible error in this record the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

T. W. BRENTS, Appellant, vs. J. R. SMITH, Appellee.

Opinion filed June 20, 1911.

1. ELECTIONS—*contestant may, by amendment, add new points to his petition.* An election contest, under the present statute, is to all intents and purposes a chancery proceeding, and it is proper for the court, after the answer is filed, to allow the contestant to amend his petition by adding new points of contest.

2. SAME—*when candidates on other tickets need not be made parties.* In a contest between the republican and democratic candidates for a county office, candidates for the office on other tickets are not necessary parties if it appears from the petition and answer that their rights cannot be affected by a re-count.

3. SAME—*marks on ballots made by judges in counting them do not destroy the force of ballots.* Judges and clerks of election should not place marks upon the face or back of the ballots when counting them, but the fact that they do so does not destroy the force of the ballots as marked by the voters.

4. SAME—*mark similar in form to the capital letter "T" is a cross.* Where the mark in the circle or square is similar in form to the capital letter "T," there is a sufficient intersection of the lines to regard the mark as a cross.

5. SAME—*fact that crosses are dim is not ground for rejecting ballots.* The fact that the crosses on certain ballots are dim, having the appearance of being made by pressing the pencil very lightly on the paper or using a pencil in which the lead was broken, is not ground for rejecting the ballots.

6. SAME—*mark resembling the letter "O" cannot be treated as a cross.* A ballot having a mark in the circle at the head of one ticket resembling the letter "O" cannot be counted as a vote for the candidates on that ticket.

7. SAME—*a pencil line through name of candidate strikes him off.* Where a pencil line is drawn horizontally through the names of the candidates for sheriff on two tickets the ballot cannot be counted for either candidate, even though there is a cross in the circle on one of the tickets.

8. SAME—*what is a distinguishing mark is largely a question of fact.* The law forbids the placing of a mark upon a ballot which will enable it to be identified as cast by a particular voter, but the question whether a given mark is or is not distinguishing is largely a question of fact.

9. SAME—*dim crosses on back of ballot are not distinguishing marks.* Dim crosses, made with a blunt instrument, on the back of a ballot having no mark on its face except a cross in the circle at the head of one of the tickets are not distinguishing marks.

10. SAME—*crosses placed after certain names are distinguishing marks.* Crosses, marked with a lead pencil, after the names of a certain candidate for representative and a candidate for county treasurer must be treated as distinguishing marks.

11. SAME—*what must be treated as distinguishing mark.* The word "Jofe," written on the back of a ballot instead of the initials of any judge, must be treated as a distinguishing mark, even though it is claimed that the nickname of one of the judges was "Joed," where such judge testified that the writing was not his.

12. SAME—*when imperfectly printed ballot cannot be counted.* A ballot so imperfectly printed that a part of the circle and squares on the first ticket is left off cannot be counted for a candidate on that ticket, where the part of the square left opposite his name is so small that the voter's cross does not intersect within it.

13. SAME—*ballot having cross in circle but entire ticket crossed out cannot be counted.* A ballot having a cross in the democratic circle and a large pencil cross the whole length of the democratic ticket, there being no other marks, cannot be counted as a vote for any candidate on the ticket.

14. SAME—*what is not ground for rejecting a ballot.* A ballot properly marked for a candidate on one ticket should be counted for him although the voter made a large cross on another ticket erasing all of that ticket but the first eight names, in front of which he had marked crosses, where he afterwards attempted to erase all of the crosses on that ticket, including the large cross.

15. SAME—*erasure of a line in circle with moistened finger is not a distinguishing mark.* A ballot marked with a cross in the republican circle and with crosses in the squares before the names of certain republican and democratic candidates should not be rejected as having a distinguishing mark because a single line was marked in the democratic circle, which the voter apparently attempted to erase with a moistened finger.

16. SAME—*when marks on back of a ballot are distinguishing marks.* A ballot having a colored cross in the democratic circle and no other marks on its face but having a colored cross at the left of the county clerk's name on the back of the ballot and the names of two candidates for other offices written with a colored pencil, must be rejected as bearing distinguishing marks.

17. SAME—*letter written after initials of judge with a different colored pencil is a distinguishing mark.* The letter "D" written

after the initials of the judge on the back of a ballot and with a different colored pencil is a distinguishing mark, where judges of the election testify that they do not know how it came to be on the ballot.

18. *SAME—erasures by filling entire square or circle with pencil marks are not distinguishing marks.* Pencil marks blackening the entire square or circle, in an attempt to thus erase crosses made by mistake in such square or circle, are not distinguishing marks.

19. *SAME—when torn ballot should be counted.* A ballot having a piece torn off of one corner but leaving enough to show that it was marked for a certain candidate should be counted for him, where one of the judges testifies when the ballots were counted the torn piece was still attached to the ballot and that when put in place the cross in front of such candidate's name was complete.

20. *SAME—when torn ballot cannot be counted.* A ballot torn into three pieces cannot be counted, where all the facts and circumstances tend to show that the ballot was intact when given to the voter and that it was torn by the voter himself; nor can a ballot be counted which in some unexplained way has both upper corners torn off, including all of the circle of the first ticket, though there is a cross in the circle of the second ticket.

21. *SAME—absence of initials of judge is fatal.* The initials of the judge on the back of a ballot are for the purpose of identifying the ballot as a legal ballot, and ballots having no initials of a judge endorsed thereon cannot be counted.

22. *SAME—ballots are the best evidence if properly preserved.* The ballots are the best evidence of the result of the election if it appears that they have been preserved in the manner and by the proper officers required by law.

23. *SAME—when judges' returns cannot be taken as conclusive.* The judges' returns cannot be taken as conclusive of the result of an election, even though the ballots may be discredited, where the tally sheets show erasures of several tallies for the defeated candidate and the ballots about which there is no controversy entitle him to several more votes than were given him by the returns.

24. *SAME—rule where both ballots and returns are discredited.* Where the evidence discredits both the ballots and the returns, the true result must be determined by a consideration of both and of all the surrounding facts and circumstances.

25. *SAME—fraud in an election may be shown by circumstantial evidence.* Fraud in the conduct of an election may, and must frequently, be shown by circumstantial evidence.

26. *SAME—when the entire district need not be thrown out.* If from the proof it can be ascertained how the voters marked their

ballots so that they can be counted, or if the honest votes can be separated from the dishonest votes and the returns purged, the entire district need not be thrown out because of fraud.

27. *SAME—what evidence shows fraud.* The fact that twenty ballots from one district are marked with two kinds of pencils, in connection with their peculiar marking, and the facts that the district was the one last counted, that the result of the election elsewhere was known, and that several unauthorized persons handled the ballots during the count without any attempt being made to prevent them from doing so, establish fraud and show that the ballots were tampered with.

28. *SAME—when black pencil crosses should be ignored.* Where the marks made by the voter with the blue pencil furnished him show that he voted for a certain candidate the ballots should be counted for such candidate, even though there are crosses marked with a black pencil before the name of another candidate for the same office, where the evidence tends strongly to show that the black crosses were not made by the voter but by some other person, probably during the canvass of the vote.

29. *SAME—when ballot cannot be counted for either candidate.* A ballot not marked in the circle but having blue pencil crosses before the names of the candidates for several offices on the republican ticket and a black pencil cross before the name of the republican candidate for sheriff, there being no vote for any candidate on the democratic ticket, cannot be counted as a vote for either the republican or democratic candidate for sheriff, where the black cross was not made by the voter.

30. *SAME—when a ballot should be counted though evidently tampered with.* A ballot marked with a blue pencil cross in the republican circle and having no mark to indicate a vote for the democratic candidate for sheriff should be counted for the republican candidate for sheriff, although some person other than the voter has made a black pencil cross in the square opposite such candidate's name.

31. *SAME—ballot cannot be counted for either candidate if it is marked, by mistake, for both.* Where a ballot is marked for both the republican and democratic candidates for sheriff in such a manner as to show that it was merely a mistake of the voter and not the result of tampering with the ballot, the ballot cannot be counted for either candidate.

APPEAL from the County Court of Christian county;
the Hon. C. A. PRATER, Judge, presiding.

HOGAN & WALLACE, for appellant.

PROVINE & PROVINE, L. G. GRUNDY, J. H. FORNOFF,
and TAYLOR & TAYLOR, for appellee.

MR. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Christian county declaring appellee elected to the office of sheriff of said county. At the regular election held on November 8, 1910, for that and other county offices, appellant, Thomas W. Brents, was the regular democratic candidate, and appellee, J. R. Smith, the regular republican candidate, for sheriff. William Hart and James A. Bickerdike were candidates, respectively, on the socialist and prohibition tickets. On the canvass of the returns Brents was given 3293, Smith 3299, Hart 172 and Bickerdike 100, and Smith was declared elected by a plurality of six votes. A contest was instituted in the county court of Christian county and the ballots were opened and re-counted, with the result that Brents was given 3277 votes, Smith 3283, Hart 176 and Bickerdike 119, and a finding made that appellee, Smith, was elected by a plurality of six votes. From that order and decree this appeal was taken to this court.

The contest was started on November 15, 1910. The petition charged incorrect counting of ballots in the various precincts but did not charge fraud. After an answer was filed setting out that some ballots had been incorrectly counted for the appellant in various precincts, the appellant, on January 3, 1911, filed, by leave of court, an amendment to his petition, charging that certain markings had been fraudulently placed upon ballots in district No. 4 of Pana, in said county, which inured to the benefit of appellee, and that said votes either ought to be counted as the ballots showed them to have been cast, or that the entire

precinct be thrown out and not counted for either candidate. It is here insisted that this amendment was improperly allowed. Contests of elections under the present act are to all intents and purposes chancery proceedings, subject to all the rules governing the same. (*Dale v. Irwin*, 78 Ill. 170; *Rodman v. Wurzburg*, 183 id. 395; *Weinberg v. Noonan*, 193 id. 165.) This court held in *Dale v. Irwin*, *supra*, that the contestant could by an amendment add points of contest not contained in his original petition. This is in accord with the general chancery practice, and we see no reason to depart from that ruling.

It is next insisted that under the ruling of this court in *Conway v. Sexton*, 243 Ill. 59, the petition should be dismissed because the socialist and prohibition candidates were not made parties to the contest. There are two sufficient answers to this objection: First, we do not find that this point was raised in the trial court; and second, the petition and answer show that it was unnecessary to make any of the other candidates parties, as it would be most unreasonable to believe that one of them could gain enough on a re-count to entitle him to be declared elected. The result of the contest proved that fact. In the *Conway-Sexton* case the pleadings did not show, and in the light of the facts in that case could not honestly show, that the candidates who were not made parties might not on the re-count have been necessary parties.

On the re-count the uncontested ballots agreed upon by attorneys for both sides gave Brents 3255 votes and Smith 3217 votes, leaving 110 contested ballots. The original contested ballots have been certified to this court with the record. They were each numbered in the court below for identification, and we shall find it convenient to identify the ballots by referring to those numbers. Many of the ballots can be divided into groups, according to the nature of the objections, and disposed of together.

Fifty-two ballots are objected to because they have on the front or back a number or numbers, followed by words. From the appearance of the ballots, as well as from the testimony of the judges and clerks, these numbers and words were made by the judges as an aid in counting the ballots and indicate the number of votes credited to various candidates. Judges and clerks should not mark ballots in this manner while counting the votes, but when it appears that the voter has complied with the law in marking his ballot he should not be disfranchised by such marks made by the judges. (*Kerr v. Flewelling*, 235 Ill. 326; *Rexroth v. Schein*, 206 id. 80.) Eleven of these votes were properly counted by the court for Brents and forty-one for Smith.

Seven ballots are objected to because, it is argued, the lines forming the attempted cross do not intersect inside the square or circle or do not form a cross. The rule often stated by this court is, that if an honest attempt was made to follow the law in making the cross in an appropriate circle or square, the fact that the cross was imperfect will not prevent the ballot being counted. (*Parker v. Orr*, 158 Ill. 609; *Kerr v. Flewelling*, *supra*; *Winn v. Blackman*, 229 Ill. 198; *Apple v. Barcroft*, 158 id. 649.) If the lines meet but do not cross or intersect they cannot be held a cross under the authorities, but if they intersect and cross, even slightly, within the proper circle or square they should be considered as a cross. Following this rule, ballots 216, 2133 and 2708 should be counted for Brents and ballots 2449, 2779, 3883 and 6875 for Smith. Ballot 4176 has a V-shaped mark in the square before the name of appellee, Smith. At no point in the square is there an intersection of the lines to form a cross. Under the ruling of this court in *Winn v. Blackman*, 229 Ill. 198, this ballot cannot be counted for Smith. Ballot 5282 has in the republican circle an irregularly-shaped mark similar in form to the letter T. This ballot should be counted for Smith. *Parker v. Orr*, *supra*.

Ballots 3014, 3589, 3783 and 6103 are objected to because the respective crosses in the republican circle or square before Smith are dim, or not made, as claimed in some cases, by lead pencil or pen. We believe in all these cases the voter honestly attempted to make a cross, in some instances by pressing the pencil very lightly on the paper and in other instances by using a pencil when the lead was broken. All these ballots should be counted for Smith. (*Rexroth v. Schein, supra.*) Ballot 6053, objected to because of dimness of the cross, will be counted for Brents.

Ballot 2604 has a mark in the democratic circle resembling a letter O. There being no attempt at a cross, this ballot cannot be counted for Brents. *Parker v. Orr, supra.*

Ballot 3450 has a cross in the democratic circle and the names of both Brents and Smith are marked out with a lead pencil line drawn horizontally through each name. This court has held that the voter can erase the name of the candidate and write in another and thus vote for the candidate whose name is written in. (*Winn v. Blackman, supra.*) While the precise question here raised does not seem to have been decided in any of the cases, we think, under the reasoning of the authorities, this vote cannot be counted for Brents.

Various ballots are objected to by each party on the ground that they bear distinguishing marks. The law forbids such a mark as will distinguish and separate the particular ballot from the other ballots cast at the election,—a mark put upon the ballot to indicate who cast it and to evade its secrecy. Whether a given mark is or is not distinguishing, is largely, if not wholly, a question of fact. *Winn v. Blackman, supra.*

It is contended by appellant that ballot 4993 should be counted for him while he contends that ballot 2154 should not be counted for appellee. If one of these ballots should be counted the other should be, and therefore the result would not be changed. Neither will be counted.

Ballot 3641 has a lead pencil cross in the democratic circle and no other mark on the face of the ballot. On the back of the ballot, a little under the official printing, are two dim crosses made by some blunt instrument pressing into the paper but no mark of lead or other marking substance. If held up to the light they show slightly through the ballot, but not in such a way as to indicate any mark as to any candidate. We hold this was not a distinguishing mark and the ballot will be counted for appellant. Ballot 1442 has a lead pencil cross in the republican circle and a lead pencil cross after the name Harp, democratic candidate for representative, and another after the name of Brockamp, the democratic candidate for county treasurer. No explanation is given as to how these marks were made on the ballots. It is argued that they are distinguishing marks. From the appearance of this ballot we are disposed to hold that these crosses are distinguishing marks and the ballot cannot be counted for Smith.

Ballot 1073 is properly marked with a cross in the square before the name of appellee, Smith. On the back of the ballot is found the word "Jofe" instead of the initials of a judge. It is argued by appellee that this is a nickname of one of the judges and that he placed it there instead of his initials. The judges in this precinct all testified as to this ballot, and the man whose nickname was claimed to be "Joed" stated that the writing was not his. We must hold this writing a distinguishing mark and the ballot should not be counted for Smith.

Ballot 2478 was apparently fed into the printing press in such manner that a part of the squares and of the circle on the democratic ticket are not on the ballot, that ticket being at the left-hand edge. The voter attempted to place a cross in a number of these parts of squares. As he approached the lower edge of the ballot the portion of the square in front of Brents' name did not give him room in which to place the cross and the lines of the cross intersect

outside of the square. This ballot was mutilated and should not have been given by the judges to the voter, and when they did give it to him he should have asked for one that was printed according to law. It cannot be counted for Brents. *Kerr v. Flewelling, supra.*

Ballot 2953 is marked with a lead pencil cross in the democratic circle and a large pencil cross covering the whole length of the democratic ticket, with no other mark on the ballot. This ballot, under the reasoning of this court in *Kerr v. Flewelling, supra*, as to this class of marks, can not be counted for Brents.

Ballot 6708 has pencil crosses in the squares before the first eight names on the socialist ticket and down the entire length of that ticket is made a large cross. All of the crosses in the squares on that ticket, as well as the large cross, have been partly erased. There are also crosses in nine of the squares on the republican ticket. Evidently there was an attempt to make crosses in the respective squares before the last three names on the republican ticket and an erasure of these crosses, the voter rubbing out in the attempt a large part of the three printed squares. There are also lead pencil crosses in the respective squares before the last three names on the democratic ticket, including Brents'. If there had been no attempt to erase the large cross on the socialist ticket, on the reasoning of the case last cited this ballot could not have been counted, but we do not feel like extending the ruling as to such marks further than laid down in that case. We are of the opinion that these crosses on the socialist ticket, as well as at the end of the republican ticket, were made by mistake, or the voter afterward changed his mind. This vote should be counted for Brents.

Ballot 3835 has a pencil cross in the circle at the head of the republican ticket and pencil crosses in the squares before eleven republican candidates (including Smith) and one democratic. There is also a single line made through

the democratic circle and an attempt to erase this, as if the voter had drawn a moistened finger over the circle. We do not think this can be considered a distinguishing mark. The ballot should be counted for Smith.

Ballot 5747 has a colored pencil cross in the democratic circle and no other mark on the face of the ballot. On the back of the ballot, at the left of the official printed signature of Henry J. Burke, the county clerk, is a colored pencil cross. A little below Burke's name are the names "F. Brents" and "Folkes," written with colored pencil. It is argued that the voter attempted to emphasize the fact that he was voting for Burke (who was running for re-election) and for Brents and Fowkes by making the cross before the printed signature and writing in the names of the other two candidates on the back of the ballot. However that may be, we consider this was so marked a departure from the law and so plainly distinguishing that the ballot cannot be counted. (*Smith v. Reid*, 223 Ill. 493; *Winn v. Blackman*, *supra*.) Had these names been on the face of the ballot where the candidates' names were printed, a different situation might have been presented.

Ballot 6636 has a pencil cross in the democratic circle and a cross in the square before the name of Evans, republican candidate for county superintendent, and no other mark on the face of the ballot. On the back of the ballot were the initials of one of the judges, followed, in a different kind of pencil, by a capital letter "D." The judges were called and stated that they did not know how this "D" was marked on the ballot. We hold it a distinguishing mark, and the ballot cannot be counted for Brents.

Ballot 3565 has a cross in the republican circle. The square before the name of Walter M. Provine, republican candidate for representative, has been almost completely filled in by lead pencil marks. Ballot 4103 has a cross in the republican circle. There is also a cross in the democratic circle, and the circle was almost completely filled in

with pencil marks covering the cross. Ballots 4779, 5125 and 6228 have each a cross in the square before the name of some candidate (not Smith) on the republican ticket, and then, in each instance, the square is filled in with lead pencil marks covering the cross. It is clear from the face of all these five ballots that the crosses over which pencil marks are drawn were made by mistake and then an attempt made to mark them out by using a lead pencil, as indicated. We do not think these pencil erasures can be held to be distinguishing marks. All five ballots should be counted for Smith:

Three ballots, each from a different precinct, are torn. Ballot 1076 has the lower left-hand corner torn off, but enough remains to show that there was a cross in the square before Brents. One of the judges in that precinct testified that he remembered, when they were counting, seeing this ballot with the torn corner still hanging by a shred, and that the cross, when the two pieces were placed together, was complete. On this situation of the record this ballot should be counted for Brents. Ballot 2281 was torn in three pieces, the democratic ticket at the left being on a separate piece and the socialist labor ticket at the right of the ballot being practically all on a separate piece. There is a cross in the republican circle and no other mark on the face of the ballot. All three of the pieces were found in the ballot-box. The judges did not know how it became torn. They testified it was not torn when they delivered it, but did not know whether it was given back by the voter torn, or not; that the ballot-box became so full that it was difficult to put the ballots through the slot and they used a stick to push them down. If the voter tore it in this manner he should have returned it and obtained another ballot. The initials of the judge, part of which appears on one piece and part on another, show that the ballot was handed to the voter intact, and it does not appear reasonable, from an inspection of the ballot, that it

was so torn while in the box. We are of opinion that this ballot was torn by the voter and should not be counted. Ballot 3579 had both upper corners torn off,—evidently torn at the same time when the ballot was folded once. The circle on the democratic ticket is torn completely away. There is a cross in the republican circle. The judges of this precinct testified that they did not know how this ballot was torn and were not sure it was torn when they counted it. The democratic circle being completely torn away we cannot tell whether it had any marks in it or not. On this state of the record the ballot cannot be counted for Smith.


Ballots 830, 860 and 1033 are marked for Smith. All of these ballots were cast in the first district of the Buckhart precinct. None of them has the initials of any judge of that precinct on the back. Under the holding of this court in *Slenker v. Engel*, (*ante*, p. 499,) and cases there cited, these ballots cannot be counted.

We have now discussed all the contested ballots except twenty from the fourth district, Pana precinct. Appellant contends that such fraud was committed in this district as to change the result. It is claimed that a number of unauthorized persons handled ballots during the count; that during the canvass of the vote some of the judges absented themselves from the room for a time, and that the closing of the count was purposely delayed until between two and three o'clock in the morning, and in the meantime the judges and clerks had learned the result of the vote on sheriff in the other districts in the county. If the returns in this district were in proper condition it might be argued that the figures of the tally sheets and statements of votes should be taken as conclusive of the result, but in this district the tally sheets show erasures, a number of tallies apparently having been scratched off from Brents. Moreover, the uncontested vote for Brents, omitting the disputed ballots, was three greater than the vote given him by the

returns of the judges and clerks.. Where the ballots have been properly preserved they are the best evidence of the result of the election. (*Bonney v. Finch*, 180 Ill. 133; *Caldwell v. McElvain*, 184 id. 552.) In order that the ballots should be controlling as evidence it must affirmatively appear that they have been preserved in the manner required by law and by the proper officers. (*Beall v. Albert*, 159 Ill. 127; *Jeter v. Headley*, 186 id. 34.) After the ballots were given to the county clerk by the judges of this precinct, as well as the judges of other precincts, the evidence shows that they were properly preserved by the county clerk and were opened at the time of the contest in the same condition as when returned to him. Where the evidence discredits both the ballots and the returns of the election officials the true result of the election must be determined by a consideration of both and of all other circumstances which will aid in determining the truth of the matter at issue. *Roland v. Walker*, 244 Ill. 129; *West v. Sloan*, 238 id. 330.

All but one of these twenty ballots from this district are marked partly in blue indelible pencil and partly in ordinary black pencil. The judges testified that blue indelible pencils were placed in the voting booths to start with, but that voters called for pencils at various times during the day and black pencils were furnished. A number of these ballots, from their appearance, might have been marked entirely by the respective voters, but it is impossible to so conclude as to the majority of the twenty. If there had been only two or three ballots thus marked with different pencils in the same district there would be less ground for suspicion. Fraud in the conduct of an election may be shown by circumstantial evidence, (*McCrary on Elections*,—4th ed.—sec. 575,) and frequently can be shown in no other way. The peculiar marking of these ballots would, in itself, arouse suspicion, but when taken in connection with the uncontradicted proof in this record that this was

the last district to be counted; that the result as to sheriff was known before the count in the district was closed; that three or four persons who had nothing to do with the canvass,—were not judges and clerks,—handled these ballots before they were counted, two of them having lead pencils in their hands; that the door of the polling place was open during the time the counting was going on; that no attempt was made to keep unauthorized persons from counting the ballots,—the proof must be held practically conclusive, from this record, that some of these ballots were tampered with. If from the proof it can be ascertained how the voters marked their ballots and they can be thus counted, or if the honest votes can be separated from the dishonest votes and the returns purged, then the entire district need not be thrown out. McCrary on Elections,—4th ed.—sec. 583.

We will first consider nine of these ballots, namely, 3742, 3744, 3748, 3756, 3763, 3764, 3772, 3774 and 3811. Each one of these ballots is marked with an indelible blue pencil for various candidates on the democratic and republican tickets. In every one of the nine ballots there is a cross made by an indelible pencil in the square before the name of appellant, Brents, for sheriff. Taking the indelible pencil crosses alone, it is clear that the person who made these crosses on each of these ballots was voting intelligently for a complete set of candidates on the ballot, although in every instance he voted a split ticket. Ballots 3742, 3763, 3772 and 3811 each have a black pencil cross in the square before the name of appellee, Smith. Ballot 3756 has a black lead pencil  in the square before Smith's name. Ballots 3748 and 3764 have black pencil crosses in the respective squares before Smith and the republican candidate for county superintendent. Ballots 3744 and 3774 have black lead pencil crosses in the respective squares before the names of appellee Smith and the republican candidate for county judge. Some, if not all, of the crosses made by black pencil appear to have been made

hastily and do not resemble in form the blue pencil crosses. We think it is clear that all of these nine ballots were marked originally by the voter with a blue indelible pencil for various candidates, including appellant, Brents, for sheriff, and that the black pencil marks were made by another person than the voter. The evidence tends strongly to show that the black crosses were made during the canvass of the votes in the precinct. If there had been only one of these ballots marked with a different colored pencil, even though it contained different colored crosses in the two squares before the candidates for the same office, it might be possible to believe that the voter had changed pencils and had erroneously voted for two candidates for the same office; but it is hardly within the range of probability that nine voters in the same voting district would mark their ballots with two different lead pencils, and that everyone of them would vote for two candidates for sheriff and use a blue pencil in making a cross in the square before the name of Brents and a black pencil in making a cross before the name of Smith. The black pencil crosses, so far as they affect appellant and appellee, on this record must be disregarded and these nine ballots counted for Brents.

Ballot 3743 has a blue pencil cross in the democratic circle and a blue pencil cross in the square before the name of Provine, republican candidate for representative, and a black pencil cross in the square before the name of appellee, Smith. If this ballot were the only one in this precinct marked in this manner we should not be disposed to disregard this black pencil cross, but in view of the similarity of this ballot to the last ballots considered, we think the black pencil cross should be ignored and the ballot counted for appellant, Brents.

Ballot 3757 has blue pencil crosses in the squares before five republican candidates for various offices and in the squares before three republican candidates for various

other offices, and a black pencil cross in the square before the name of appellee, Smith. There is no other mark on the face of the ballot. In view of the facts on this record we hold that the black pencil cross should be ignored and this ballot not be counted for either appellant or appellee.

Ballot 3823 has a blue pencil cross in the circle at the head of the democratic ticket. The three black crosses marked on this ballot do not in any way affect any of the candidates for sheriff, and the ballot should be counted for Brents.

Ballot 3765 has a blue pencil cross in the democratic circle and also in the square before the name of Harp, democratic candidate for representative, and a black pencil cross partly in and partly out of the square before the name of Smith, the intersection being plainly outside of the square. For this reason, as well as for the reasons already given, this black pencil cross should be ignored and the ballot counted for Brents.

Ballots 3773, 3777 and 3780 each have a blue pencil cross in the square before the name of appellee, Smith. The black lead pencil crosses in the various squares on each of these ballots are not before the names of any of the candidates for sheriff or do not affect in any way the counting of the ballots as to that office. These three ballots should therefore be counted for appellee, Smith.

Ballot 3758 is marked with a blue pencil cross in the republican circle, in the square before the name of Provine, candidate for representative on the same ticket, and in the respective squares before the democratic candidates for county clerk and county superintendent. On the republican ticket there are black pencil crosses in the respective squares before the candidates for county judge, sheriff and county superintendent. Following a consistent line of reasoning as to this district and these different colored pencil crosses, the blue pencil cross in the circle at the head of the repub-

lican ticket would still require this ballot to be counted for appellee, Smith.

Ballots 3721 and 3768 have blue pencil crosses before various candidates and black lead pencil crosses before various other candidates, including a black lead pencil cross on each ballot in the square before Smith. There is no mark except these two crosses on either of the ballots that in any way affects the counting as to sheriff. The black pencil crosses on ballot 3768 are so scattered over the ballot that we think it would have been very difficult for a person secretly to have made them all during the time the ballots were being counted. On most, if not all, of the previous seventeen ballots that we have considered from this precinct, the black lead pencil crosses appear to have been made hastily and in a different form from the blue pencil marks. This is not true as to ballot 3768 and possibly is not true as to ballot 3721. Practically the only thing that throws doubt on these two ballots is the extrinsic evidence. Notwithstanding that evidence we are disposed to count these two ballots for appellee, Smith.

Ballot 3781 has a blue lead pencil cross in the square before the democratic candidate for county treasurer, in the square before the name of appellant and the square before appellee, and the square before the republican candidate for county superintendent. These are all the marks on the face of the ballot. This ballot, alone, would not arouse suspicion of anything more than a mistake on the part of the voter, and even with the rest of the proof in the record we are not prepared to say that the voter did not make the two blue pencil marks in the respective squares before the names of appellant and appellee, both running for sheriff. This ballot cannot be counted for either appellant or appellee.

It is insisted by appellant that if the court should count these ballots in said fourth Pana district as indicated above, then, following the same reasoning, the court should count

eight ballots in district No. 1 of Buckhart township, which were not counted by the trial court. It is contended by the appellee that these ballots cannot be considered by this court as they were not properly presented here by the record. We are inclined to agree with that contention. We deem it proper, however, to say that there is no proof of any kind in the record to show that any fraud was committed in the first Buckhart district. Although on some of these ballots different colored pencils were used in marking crosses, still, without some extrinsic proof of fraud we would not feel justified in ignoring the black pencil crosses, as we did in the fourth Pana district. Moreover, if this were done it would not change the final result. While the result on the face of the returns, on the contest in the trial court and in the counting of the ballots in this court has been close, if a consistent line of reasoning be followed as to the various questions raised, we are convinced that the result cannot be more favorable to appellee than reached in the foregoing opinion.

Apparently no effort was made by the judges of election in the fourth district of Pana, during the canvass of the votes, to enforce the law and prevent unauthorized persons from handling the ballots. An election conducted with as little regard to the law as was the canvass of the ballots in that district would be but a mockery. The safety and perpetuity of popular government depends on the purity of its elections. The sanctity of the ballot should be safeguarded in every possible manner. The courts can perform no higher duty, in a contest of this character, than to enforce strictly and impartially the election laws of the State.

Adding to the 3255 uncontested votes for appellant, Brents, the 30 contested ballots we have counted for him, gives him 3285. Adding to Smith's 3217 uncontested votes the 62 contested ballots we have counted for him, gives him 3279. This leaves a plurality of six votes for Brents. It

follows that Thomas W. Brents was duly elected sheriff of Christian county, and that the county court erred in finding appellee, J. R. Smith, elected and rendering judgment accordingly.

The judgment of the county court will be reversed and the cause remanded to that court, with directions to enter a judgment in favor of appellant.

Reversed and remanded, with directions.

WILSON W. THURSTON *et al.* Defendants in Error, *vs.*
ELMER TUBBS, Plaintiff in Error.

Opinion filed June 20, 1911.

APPEALS AND ERRORS—the record should show affirmatively that guardian *ad litem* was appointed for minor. A decree rendered in accordance with the prayer of a bill to cancel, as a cloud on complainants' title, an alleged misdescription of land in a will must be reversed where the record fails to show affirmatively the appointment of a guardian *ad litem* for a certain minor, to whom the will devises the remainder in fee in the lands covered by the description sought to be corrected, his claim being, therefore, directly adverse to the claim of complainants.

WRIT OF ERROR to the Circuit Court of Marion county;
the Hon. A. M. ROSE, Judge, presiding.

WILLIAM G. WILSON, and SAMUEL N. FINN, for plaintiff in error.

E. D. TELFORD, for defendants in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Wilson W. Thurston and Daisy V. Thurston filed a bill in equity in the circuit court of Marion county to quiet their title to certain lands therein described, and praying that an alleged misdescription contained in the second paragraph of the last will and testament of Vickerman Rob-

inson be declared a cloud upon complainants' title and as such removed therefrom. Elmer Tubbs was made the sole defendant to the bill and filed an answer thereto, signed by himself, "by W. G. Wilson, solicitor for defendant." The cause was heard upon evidence reported by the master in chancery and other evidence heard in open court, and a decree was rendered in accordance with the prayer of the bill. To reverse this decree Elmer Tubbs has sued out this writ of error, and the record has been brought to this court for review.

We are of the opinion that there is an error in this record which requires a reversal of the decree below without regard to the real merits of the controversy. It appears both from the bill and answer that plaintiff in error is a minor under the age of twenty-one years. He was regularly served with summons and appeared by attorney and answered the bill. There was no prayer in the bill for the appointment of a guardian *ad litem* and none was appointed. The minor was directly interested in the subject matter of the action, as will appear from the following statement of the facts: Vickerman Robinson, a widower of advanced years, residing in Marion county, was in his lifetime the owner of a farm of 280 acres. He had seven children. In 1896 he made deeds purporting to convey 40 acres of land to each of his said children. These deeds were properly executed and left in the hands of William Jones, a notary public, who had prepared said deeds, with instructions from the grantor "to keep them until after the death of the grantor and then deliver them to the parties named as grantees." A few years afterwards Vickerman Robinson married. In 1900 he executed a will, by which he gave his wife a life estate in the south-east quarter of the north-east quarter of section 35, township 3, range 3, east, with remainder in fee to Elmer Tubbs, a son of Florence May Tubbs and grandson of the testator. The south half of the above described 40 acres was in-

cluded in a deed made by the testator to his son, Clarence Robinson, and the north half thereof was in the deed made to his daughter, Daisy, now Daisy Thurston. Clarence Robinson conveyed the south half of said 40 acres to Wilson W. Thurston, husband of Daisy Thurston, who were complainants below and are defendants in error here.

It will thus be seen that plaintiff in error claimed to be the owner in fee, subject to the life estate of the widow of the testator, of the south-east quarter of the north-east quarter of section 35, while defendants in error claim the same lands under the deeds executed by Vickerman Robinson. Questions arising out of these conflicting claims of title were decided by the court below and have been argued in this court.

Since the failure of the court to appoint a guardian *ad litem* for plaintiff in error to represent him and protect his rights in the premises requires a reversal of the decree, we do not deem it proper to express any opinion upon any question relating to the merits of this case until plaintiff in error has had an opportunity to be heard by a guardian *ad litem* appointed by the court to properly protect his interests. The record should affirmatively show that a guardian *ad litem* was appointed to appear and answer for infant parties, otherwise the judgment or decree will be reversed on error or appeal. 22 Cyc. 636; *Essington v. Neill*, 21 Ill. 139; *Rhoads v. Rhoads*, 43 id. 239; *Hall v. Davis*, 44 id. 494; *Roodhouse v. Roodhouse*, 132 id. 360; *Ames v. Amcs*, 151 id. 280; *Phillips v. Phillips*, 185 id. 629; *Binns v. LaForge*, 191 id. 598; *White v. Kilmartin*, 205 id. 525.

For the error of the court in proceeding to hear said cause and rendering a final decree therein against the minor defendant without the appointment of a guardian *ad litem*, the decree of the circuit court is reversed and the cause remanded.

Reversed and remanded.

A. M. WALKER, Appellant, *vs.* WILLIAM P. LOVITT,
Appellee.

Opinion filed June 20, 1911.

1. **CONTRACTS**—*contract will be enforced according to its legal effect where made or to be performed.* The validity, construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed, and courts of another jurisdiction will so enforce it.

2. **SAME**—*rule where contract for payment of money is silent as to place of payment.* Where a contract for the payment of money is silent as to the place of payment such place is presumed to be the place where the contract was made, and the debtor must seek the creditor at his domicile or place of business.

3. **SAME**—*place where contract is made is the place where it is delivered.* The place where a contract is made depends not upon where it is actually written, signed or dated, but upon the place where it is delivered as consummating the bargain.

4. **BILLS AND NOTES**—*when a payee's residence is place where contract is made.* Where a note made by a citizen of Illinois is delivered by his agent to the payee at her home in a foreign State, and she then delivers a check to the agent for the amount of the note, which is silent as to place of payment, the residence of the payee is the place where the contract is consummated and payment is to be made, and the question is not affected by the disposition which the agent may have made of the money.

5. **SAME**—*validity of foreign contract not affected by fact that mortgage is given on Illinois land.* Where a contract for the payment of money is to be performed in a foreign State, the validity of such contract under the laws of the foreign State is not affected by the fact that its performance is secured by a mortgage on Illinois land, as the mortgage is but an incident of the agreement, the legal fulfillment of which is the payment of the money.

6. **SAME**—*party suing on foreign note need not plead the interest law of foreign State.* A party suing on a note made and to be paid in a foreign State need not plead or prove the interest law of such foreign State even though the note bears a higher rate of interest than is allowed by law in Illinois, as the plaintiff is not relying upon foreign law but upon the contract, and if the latter is usurious the burden is upon the defendant to prove it so.

7. **USURY**—*object of various statutes relating to rate of interest.* The object of the various Illinois statutes concerning the law-

ful rate of interest has not been to make void any contract which would be valid under the law of a foreign State, but to make valid against citizens of Illinois, and their property, contracts which might be invalid under the law of the State where made; and in so doing the legislature has not violated any constitutional limitation, as would be the case had it undertaken to invalidate legal contracts made in another State.

8. SAME—*legislature cannot prohibit making contracts outside the State which are valid where made.* The legislature of a State has no power to prohibit its citizens from making, beyond limits of the State, contracts which are lawful in the place where made, even though such contracts may concern property within the State.

9. SAME—*extent to which section 8 of the Interest act may be enforced.* Section 8 of the Interest act cannot, without violating constitutional rights, be applied except to cases where the rate of interest that may be charged by the law of the State or country where the contract is made is less than the rate that may lawfully be charged in this State.

10. SAME—*when a foreign note is not usurious.* A note made by a citizen of Illinois and payable at the home of the payee in a foreign State where the note was delivered, and which bears interest at the rate allowed by law in such foreign State, is not usurious; even though such rate exceeds the rate allowed by law in Illinois and the note is secured by a mortgage on Illinois land; and in case of suit in Illinois upon the note section 8 of the Interest act presents no defense.

APPEAL from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

ANDERSON & MATTHEWS, for appellant.

W. E. WILLIAMS, and A. CLAY WILLIAMS, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

To an action on a promissory note the appellee set up the defense of usury as to all except a certain amount which was tendered to the plaintiff. The note, on its face, bore eight per cent interest, to be compounded annually if not paid annually. The note was dated Louisiana, Missouri, and was payable generally. The payee was a citizen and

resident of Missouri and the appellee a citizen and resident of Illinois. The rate of interest was lawful in Missouri. The note was secured by a mortgage on real estate in Illinois, and the appellee contends that by virtue of section 8 of chapter 74 of Hurd's Statutes of 1909 the interest contracted to be paid was forfeited. The circuit court sustained this contention, and the plaintiff has appealed from the judgment directly to this court on the ground that the constitutionality of the section mentioned is involved.

That section is as follows: "When any written contract, wherever payable, shall be made in this State, or between citizens or corporations of this State, or a citizen or corporation of this State and a citizen or corporation of any other State, territory or country, (or shall be secured by mortgage or trust deed on lands in this State,) such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons or corporations in this State or which is or which may be allowed by law on any contract for money due or owing in this State: *Provided, however,* that such rate of interest shall not exceed seven per cent per annum. And if any such person or corporation shall contract to receive a greater rate of interest or discount than seven per cent, upon any such contract, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

If the note was an Illinois contract it was usurious on its face, without reference to this section. If it was a Missouri contract it was enforceable in this State according to the stipulated rate though in excess of the rate allowed by our law, unless the interest was forfeited by the application of this section. (*Phinney v. Baldwin*, 16 Ill. 108; *Smith v. Whittaker*, 23 id. 367; *Morris v. Wibaux*, 159 id. 627; *Dearlove v. Edwards*, 166 id. 619.) The question of the

application of the section was preserved by propositions of law submitted to the court.

The rule is well settled that the validity, construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed. The law of the place becomes a part of the contract, and the courts of another jurisdiction will enforce it in accordance with its legal effect where made or to be performed. (*Evans v. Anderson*, 78 Ill. 558; *Barnes v. Whittaker*, 22 id. 606; *Mumford v. Canty*, 50 id. 370; *Roundtree v. Baker*, 52 id. 241; *Coats v. Chicago, Rock Island and Pacific Railway Co.* 239 id. 154.) When a contract for the payment of money is silent on the subject, the place of payment is presumed to be the place of making and the debtor must seek the creditor at his domicile or place of business. (*Es-may v. Gorton*, 18 Ill. 483; *DeWolf v. Johnson*, 10 Wheat. 367.) The place where a contract is made depends not upon the place where it is actually written, signed or dated, but upon the place where it is delivered, as consummating the bargain. (*Gay v. Rainey*, 89 Ill. 221.) The note here was delivered by the agent of the appellee to the payee at her residence in Louisiana, Missouri, and she then delivered to such agent a check for the face of the note. The contract was thus consummated in Missouri and the note then took effect as the appellee's obligation to re-pay the money there where he had borrowed it. The disposition the appellee's agent may afterward have made of the money cannot affect the rights of the parties to the note.

The substance of section 8 above mentioned, omitting the clause referring to security on lands in this State, first appeared in our statutes in 1857. The conventional rate of interest in this State was then ten per cent, which was higher than the rate permissible in other States and countries from whose citizens and corporations the citizens of this State were accustomed to borrow money, secured by mortgages on land in this State. Under the laws of these

other States and countries various results followed a usurious contract, ranging from a forfeiture of the excess of interest to the complete avoidance of the contract. Where a contract or loan was made in this State, or between citizens of this State and citizens of such foreign State, and performance or payment was to be made in such foreign State, the contract or loan was governed by the law of such foreign State, and was valid or invalid as and to the extent determined by such foreign law. (*McAllister v. Smith*, 17 Ill. 328; *Adams v. Robertson*, 37 id. 45; *Andrews v. Pond*, 13 Pet. 65.) Thus, a note given in New York by a citizen of this State and payable there, bearing interest at a rate in excess of seven per cent, was void because so declared by the law of New York though in Illinois it was competent to contract for ten per cent. To meet this situation and enable citizens of this State to borrow money in other States whose usury laws were more stringent, and to give obligations and security for loans so made that should be legally binding and enforceable here against the borrowers and their property though not enforceable where made, the General Assembly passed two acts. One, which went into effect February 12, 1857, provided that when any contract or loan should be made in this State or between citizens of this State and any other State or country, bearing interest at a rate lawful in this State, it should be lawful to make the principal and interest of such contract or loan payable in any other State or territory of the United States or in the city of London, in England, and in all such cases the contract or loan should be governed by the laws of this State and not affected by the laws of the State or country where the same should be made payable, and that no contract or loan theretofore made bearing interest at a rate lawful in this State when such contract was made, should be invalidated or in anywise impaired or affected by reason of the same having been made payable in any other State or country. (Laws of 1857, p. 38.) At the same session

"an act for the encouragement and security of loans of money" was passed, which went into effect February 16, 1857, and provided that it should be lawful for any person or corporation borrowing money in this State to make notes, bonds, mortgages and other securities for the payment of principal or interest at the rate authorized by the laws of this State payable at any place where the parties might agree, though the legal rate of interest in such place might be less than in this State, and such securities should not be held to be usurious or invalidated because of the rate of interest at the place where the paper should be made payable being less than in this State or because of any usury or penal law in such place. It was further provided that no plea of usury or defense founded upon an allegation of usury should be sustained in any court of the State nor any security held invalid on an allegation of usury, where the rate of interest did not exceed that allowed by the laws of this State, because of such security being payable at a place where such rate of interest was not allowed. (Laws of 1857, p. 33.)

It was not the object of these acts to restrict the power of the citizen to contract for the payment of interest. They were enabling acts, and were intended to encourage the lending of money in the State by enabling its citizens to make a valid contract to re-pay the money in the State where it was borrowed, even though it was recognized that the contract would be void in that State. Their effect and intention were not to make void any contract which would be valid under the law of a foreign State, but to make valid against citizens of Illinois, and their property, contracts which under the law of the State where made would be void. They were therefore open to no constitutional objection. In *Fowler v. Equitable Trust Co.* 141 U. S. 384, they were enforced by the Supreme Court of the United States in a case where it was sought to interpose the defense that the contract of loan was a New York contract

payable in New York and was void under the usury laws of that State.

In the revision of 1874 these two statutes were repealed and a single section was enacted on the subject, as follows: "When any bond, bill, draft, acceptance, mortgage or other contract, shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, territory or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, territory or country, such contracts shall be governed by the laws of this State." (Rev. Stat. 1874, chap. 74, sec. 8.) In 1875 this section was amended so as to read precisely as it does now, except for immaterial verbal changes and the rate, which has since been reduced from ten to seven per cent. (Laws of 1875, p. 85.) The object of the legislature has always been the same,—to enable citizens to borrow money outside the State at the highest rate permitted by law within the State, and to give valid obligations therefor, though such obligations may be invalid by the law of the State where made. The legislature has power thus to make contracts otherwise invalid enforceable in this State, for in so doing it violates no constitutional limitation. If it is undertaken to invalidate legal contracts made in another State the case is different. Such action would deny to the parties to the contract the equal protection of the laws and abridge their privileges as citizens of the United States, and deprive them, without due process of law, of the liberty of making contracts outside the State in regard to their property. The legislature of a State has no power to prohibit its citizens from making, beyond the limits of the State, contracts lawful in the place where they are made, even though such contracts may concern property within the State. (*Allgeyer v. State of Louisiana*, 165 U. S. 578.) The validity of the contract here is in no way affected by the fact that its performance was secured by a mortgage of Illinois land. The mortgage was but an in-

cident of the agreement. "The mere taking of foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is re-payment of the money and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows, unless another place of payment be expressly designated by the contract." (*DeWolf v. Johnson, supra*; *Coghlan v. South Carolina Railroad Co.* 142 U. S. 101; *Manhattan Life Ins. Co. v. Johnson*, 188 N. Y. 108; *Lockwood v. Mitchell*, 7 Ohio St. 387.) The section of the statute under consideration, without violating constitutional rights, can be applied only to cases where the rate of interest that may be charged by the law of the State or country where the contract is made is less than the rate that may lawfully be charged in this State.

A distinction is sought to be drawn by counsel for appellee between statutes which declare a usurious contract void and those which merely provide for a forfeiture of interest, but the difference is only one of degree and not of kind. No more authority exists for taking from an individual the benefit of a part of his contract than for taking all.

It is also insisted that the appellant did not plead the Missouri statute in regard to interest and therefore it was not properly admitted in evidence. It was not necessary for the appellant to aver or prove the law of Missouri. The burden of proving usury was on the defendant relying upon it as a defense. The appellant claimed a recovery not because of the law of Missouri but upon the contract, and if that was unlawful the burden of showing it was on the appellee. *Dearlove v. Edwards, supra*; *Smith v. Whittaker, supra*.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

CHARLES H. GERSCH, Plaintiff in Error, vs. THE CITY OF
CHICAGO *et al.* Defendants in Error.

Opinion filed June 20, 1911.

1. OFFICES—*there is no statute in force creating the office of police patrolman in Chicago.* The office of police patrolman in Chicago was not created by the city's special charter nor preserved when the city adopted the Cities and Villages act, and there is now no statute in force creating such office. (*Bullis v. City of Chicago*, 235 Ill. 472, adhered to.)

2. MANDAMUS—*when existence of ordinance creating office is essential to suit.* The existence of an ordinance creating the office of police patrolman is essential to the maintenance of a *mandamus* suit to compel the placing of petitioner's name upon the roster of police patrolman of Chicago and upon the pay-roll and to certify his name for payment of salary as such police patrolman.

3. COURTS—*it is for the legislature, and not the courts, to correct defects in the law.* The fact that there may be a defect in the law in regard to the method provided by the Cities and Villages act for creating offices and filling them, and therefore, by reason of such defect, an inconsistency between such act and the Civil Service act, does not authorize the courts to usurp the functions of the legislature in correcting such defect or inconsistency.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. CHARLES A. McDONALD, Judge, presiding.

On February 15, 1911, the plaintiff in error filed a petition in the superior court of Cook county praying for a writ of *mandamus* to place his name upon the roster of police patrolmen of the city of Chicago and upon the pay-roll and to certify his name for payment of his salary as such police patrolman. A demurrer was sustained to the petition, and the petitioner having elected to stand by it, the petition was dismissed at his costs. The petitioner has sued out a writ of error from this court to review the judgment on the ground that by it his right to share in the police pension fund is abridged, in violation of the four-

teenth amendment to the constitution of the United States and of section 2 of article 2 of the constitution of this State.

The petition sets out very fully the provisions of the charter of the city of Chicago of 1863 in regard to the police department, the amendment thereof and a number of ordinances of the city upon the subject of the police; the adoption by the city of the Cities and Villages act on April 23, 1875; the passage on June 28, 1875, of an ordinance for the re-organization of the police department, and on April 13, 1881, of another ordinance on that subject; the adoption on March 25, 1895, of the City Civil Service act by the voters of the city and its going into effect on July 1, 1895. All these facts are alleged as they appeared in the case of *Bullis v. City of Chicago*, 235 Ill. 472. The petition also alleges the appointment of a board of civil service commissioners, and their adoption of rules and classification of the offices and places of employment in the city. It is then alleged that Charles H. Gersch, the plaintiff in error, was appointed to the office of police patrolman on August 17, 1876, by the general superintendent of police, took the oath of office, entered upon the performance of his duties and continued therein until wrongfully discharged; that he continued in office and was recognized as police patrolman by the mayors, superintendents of police and city councils and no successor was appointed for him but money was appropriated for his salary, and his salary as such police patrolman was paid to him until July 1, 1893, when he was promoted to police patrol sergeant, the duties of which office he performed until June 1, 1895, when he was promoted to police desk sergeant, which office he held when the Civil Service act went into effect, July 1, 1895; that thereupon he became a member of the classified civil service of the city of Chicago and so continued as police desk sergeant until November 23, 1907, when he was wrongfully reduced to the office of police patrolman, in which he

served until December 2, 1910, when his name was dropped from the pay-roll by order of the superintendent of police, wrongfully and without warrant of law, without any written charges, without trial and for no alleged misconduct. During all the time from July 1, 1895, to December 2, 1910, all pay-rolls of officers and employees of the city of Chicago, including police patrolmen and sergeants in the police force, have been certified by the board of civil service commissioners, and the plaintiff in error has been so certified and paid.

A. B. CHILCOAT, for plaintiff in error.

EDWARD J. BRUNDAGE, Corporation Counsel, and ROBERT R. JAMPOLIS, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

In *Bullis v. City of Chicago*, 235 Ill. 472, and in numerous other decisions both before and since, many, if not all, of which are cited in *Preston v. City of Chicago*, 246 Ill. 26, questions decisive against the contention of the plaintiff in error have been determined. At the foundation of his case lies the proposition that the office of police patrolman was created by the charter of the city of Chicago in 1863 and was not abolished when the city adopted the Cities and Villages act. The cases referred to have decided this proposition against him, and have decided that there is now in force no statute creating the office of police patrolman and that a suit of this character cannot be maintained without an ordinance creating the office. His counsel devotes himself to a vigorous argument that these cases were wrongly decided and the positions announced in them should be abandoned, but we are not convinced and it would be useless to repeat the argument. Not only does the petition fail to allege any ordinance creating such office, but counsel states in his brief that there is no such ordinance, and

that therefore it follows that if the court adheres to its former decisions there are no policemen, either *de jure* or *de facto*, in the city of Chicago. This may be true, and it may be true that there is a defect in the law in regard to the method authorized by the Cities and Villages act of creating offices and filling them, and an inconsistency, because of such defect, between that act and the City Civil Service act. If so, it is the province of the legislature and not the court to correct such defect or inconsistency.

Under the former decisions of the court, to which we adhere, the demurrer was properly sustained.

Judgment affirmed.

JOHN TIJAN, Defendant in Error, vs. THE ILLINOIS STEEL COMPANY, Plaintiff in Error.

Opinion filed June 20, 1911.

1. MASTER AND SERVANT—*a servant does not cease to be a servant during rest periods.* Where two servants work alternately for thirty-minute periods during the twelve hours of their employment they do not cease to be servants during their rest periods, and the master is liable for a negligent act performed by one servant during his rest period if the act is one for which the master would be responsible if done by the servant while on duty.

2. SAME—*master liable where servant performs a duty at the wrong time.* If the act done by a servant is one which he is employed to do the master is responsible for the negligence of the servant in doing the act at the wrong time, whether it was done intentionally or accidentally.

3. EVIDENCE—*what evidence not competent on the question of necessity for the master making rules.* Upon the question of the necessity for promulgating rules for the government of employees employed in the various mills of a large manufacturing plant, it may be proper to prove the situation in the mill where the injury to a workman occurred, the character of the machinery and number of men employed therein, but it is not competent to prove the extent of the entire plant and total number of men employed; but it is not necessarily reversible error to permit such proof.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Will county; the Hon. CHARLES B. CAMPBELL, Judge, presiding.

Defendant in error was employed by plaintiff in error in its steel mills in Joliet. While engaged in the line of his employment he was seriously injured and brought this suit to recover damages, charging in his declaration that said injuries resulted from the negligence of plaintiff in error. He recovered a judgment, which has been affirmed by the Appellate Court for the Second District, and the case is brought here by writ of *certiorari*.

We adopt the following statement of the case made by the Appellate Court:

"The appellee was employed by appellant as a member of a gang of men known as the 'sailor gang,' repairing a re-heating furnace in the billet mill in the appellant's steel works. A row of furnaces extended east and west. South of the furnaces, and about a foot from them, a narrow-gauge track extended east and west through the entire length of the row of furnaces. Upon this track a small but heavy iron car or ingot buggy, about two feet high and four feet long, was operated for carrying steel ingots. The space between the furnace and the car was from six to ten inches, and there were some gear wheels on the side of the car that approached still nearer to the furnace. The car was moved by means of cables attached to each end that ran over drums at either end of the track. The power was furnished by electricity that moved the drum at the end towards which it was desired to move the car. The power was applied or controlled in a cage or shanty about seven feet square that was elevated somewhere from ten to eighteen feet above the track. There were two appliances in the cage which controlled the power that moved the drums.

The first appliance was an electric switch on the east side of the cage, about four and a half feet from the floor, for the purpose of cutting out the electric current from the controller. The switch was an ordinary fork-switch, about six or eight inches long and three or four inches wide. At the top or above the switch were two prongs or forks. The switch had a wooden cross-bar and two copper bars at right angles with it, which entered the forks to close the switch. The wooden handle was on the cross-bar and the lever ends of the bars were pivoted. The switch would be opened by pulling the wooden handle, so as to cause the connecting bars to come away from the prongs. The electrical connection would then be broken and the car could not be moved except when the switch was closed. The switch was open when the wooden handle stood out from the wall or hung down, and was only closed when the handle was upright above the forks. The other appliance was the controller, which was a metallic box about two and one-half feet long from east to west, with a lever extending out of the top, which moved east or west. When the lever stood upright in the center it was in a neutral position and the machinery did not move. If the lever was moved to the east when the switch was closed the car moved east, and if the lever was moved west from the center the car would move west. The further east or west the controller was moved the faster the car would move in that direction. There was also a lift, a steam lever, a whistle, a bench seat and a stove in the cage. The lift was to work another gearing which was upon the buggy, so as to remove the ingot off the buggy. The lever was to start the engine up to run the ingot off the rolls, and the whistle was to call for another ingot. These appliances were all operated by the man in the cage in charge of the controller and switch. The accident happened between one and two o'clock on the morning of December 10, 1907, while work in the billet mill had been suspended for about twenty minutes previ-

ously for want of material. The appellee, under the direction of his foreman, was at work with his gang repairing one of the re-heating furnaces while the billet mill was not running. The ingot buggy had been standing a few feet east of the furnace the gang was repairing. While the appellee was stooping down, lifting an iron rail, between the narrow-gauge track and furnace, the ingot buggy suddenly started west and caught appellee between the buggy and the furnace, rolling him in the narrow space and very seriously injuring him.

"The counts on which the trial was had severally allege that the appellant was negligent (1) in failing to exercise reasonable care in providing reasonable safety appliances or safeguards for a certain electric switch; (2) in failing to make, promulgate and enforce reasonable rules in warning and prohibiting its servants and persons on its premises from moving, starting or interfering with electric switches, controllers or appliances when the appellant's machinery was not in motion; (3) in failing to make, post or enforce rules preventing the assembling of servants in places where they were not employed; (4) in neglecting by its servants to move the switch a reasonably safe distance from the fork and to turn the switch in a downward position; (5) in failing to remove or blockade the car and prevent it from running on the track; and (6) in permitting its servants to assemble in the cage. Each count averred that appellee was in the exercise of due care; that the injuries did not result from an assumed risk and were not caused by the negligence of a servant who was a fellow-servant with appellee."

KEMPER K. KNAPP, R. W. CAMPBELL, and WILLIAM BEYE, (GARNSEY, WOOD & LENNON, of counsel,) for plaintiff in error.

JOHN W. D'ARCY, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Two grounds are urged for reversal of the judgment: First, that the proof fails to establish any liability on the part of plaintiff in error and the circuit court should have directed a verdict in its favor; and second, the circuit court erred in the admission of evidence.

The car which caused the injury was moved east and west by a controller in the shanty, which had the appearance of a metallic box. The power was electricity and was applied and disconnected by means of a switch in the shanty. When the lever was in the center of the controller the car would not move, even with the electric current applied. When it was desired to move the car west the lever in the controller was moved west, and when it was desired to move the car east the lever was moved east. When the switch was thrown out the car could not be moved by the controller. The switch was located on the east side of the shanty, about four and one-half feet from the floor, and was within reach of anyone who might be in the shanty. It extended six or eight inches out from the wall and there was no protection of any kind around it. When the controller was off the neutral position, opening or closing the switch would stop or start the car. The shanty was a small room about seven feet square, and in it there were a stove, and a bench about six feet in length, on which the operator could rest during the period he was relieved. The evidence shows that this shanty was frequented by other employees for the purpose of lounging. The electrical appliances were operated, on the night the injury occurred, by Leslie Fewtrell and William Erik, boys of the ages of seventeen and sixteen years, respectively. They went on duty at six o'clock P. M. and worked until six o'clock A. M. They worked alternately, thirty minutes at a time. Shortly after one o'clock, while Fewtrell was in charge of the appliances, the machinery was closed down, and he moved the controller to the neutral position and opened the switch

by pulling the handle out from the wall a few inches. At 1:30 o'clock, while the mill was still shut down, Erik took charge of the shanty and appliances therein and Fewtrell remained in the shanty during his rest period. Two other employees of plaintiff in error were also in the shanty at the time and occupied the bench used for resting upon. One of them moved so as to give Fewtrell room to sit near the stove, but it becoming too warm for him there he got up, moved the lever of the controller to the west as far as it would go, and sat on the controller. He had a stick in his hand at the time, and seeing the switch out of the forks, touched the handle with the stick and closed the switch. The controller having previously been moved to the west, the car shot forward on the track and struck defendant in error, very seriously injuring him.

We are of opinion that under the evidence the plaintiff in error was responsible for the negligent act of Fewtrell. This is stoutly denied on the ground that said negligent act was performed by Fewtrell during the thirty minutes of his rest period and while it was the duty of Erik to operate the appliances in the shanty. It is true, the lever of the controller was moved and the switch thrown in by Fewtrell during his period of rest, but it was during the hours of his employment. He was employed to work from six o'clock P. M. to six o'clock A. M., was paid for that time and during that time he was the employee of plaintiff in error. (*Heldmaier v. Cobbs*, 195 Ill. 172; *Bailey on Personal Injuries*, secs. 3208-3214.) The mere fact that every thirty minutes Fewtrell was granted a period of rest did not terminate his employment nor relieve the company from liability for acts performed by him, if the company would be liable for the acts if they were performed during the thirty minutes he was working. The act itself was within the scope of Fewtrell's duties. In fact, it was one of the duties which he was employed to perform, except that it was performed at the wrong time. Whether the

switch was closed accidentally or intentionally, it was done by the servant of the plaintiff in error and was within the scope of his duties, and being performed during the period of his employment the master is liable.

One count in the declaration charged plaintiff in error with negligence in failing to make, promulgate and enforce rules warning and prohibiting its servants and persons on its premises from moving, starting or interfering with electrical appliances when the machinery was not in motion, and another count charged negligence in failing to make, post and enforce rules preventing the assembling of servants in places where they were not employed. It does not appear that there were any such rules or warnings promulgated or posted, and for the purpose of showing the necessity for them, defendant in error was permitted, over the objection of plaintiff in error, to prove the extent of the plant of plaintiff in error and the number of men employed by it. Plaintiff in error's plant is composed of several different departments or mills. The injury to defendant in error occurred in one of its billet mills, and we do not think it was material to prove more than the situation in that mill, the character of the machinery and the number of men employed therein. We do not think it was competent to prove the number and character of other mills than the one in which the injury occurred or the entire number of men employed in the whole plant. The objection made to the proof when it was offered was that it was immaterial. While we think the evidence was not strictly competent, we are of opinion it was not so prejudicial as to require a reversal of the judgment.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

PAUL E. POLZIN, Appellant, vs. RAND, McNALLY & Co.
et al. Appellees.

Opinion filed June 20, 1911.

1. CONSTITUTIONAL LAW—*an act which would render a public school law ineffectual would be invalid.* It is the constitutional duty of the General Assembly to provide a thorough and efficient system of free schools whereby the children of the State may receive a good common school education, and any act of the legislature which would make inoperative or render ineffectual laws adopted for the establishment and maintenance of an efficient system of free schools would be invalid.

2. SAME—the State has right to regulate price of school books. The State has the right to regulate the adoption and price of text books used in the public schools, and while the possibility that publishers may not comply with the law may go to the question of the wisdom of the law, it does not go to its constitutionality and is not ground for holding such law invalid.

3. SAME—the legislature may require licensing of public school text books. Requiring the licensing of all public school text books offered for sale in the State is a provision in aid of the power of the State to regulate the adoption and price of such books, and in enacting such provision the legislature has the right to assume that the publishers will comply therewith.

4. SAME—publishers cannot, by defying School Text-book law, render it invalid. The legislature cannot compel publishers of public school text books to license their books but it may make the licensing of such books a condition precedent to the right to sell them in the State, and the publishers cannot, by defying the law, render it invalid, even though their action may result in temporarily closing the schools.

5. SAME—School Text-book law requires licensing of all text books used in public schools. The effect of the School Text-book law of 1909 is to require the licensing of all text books used in the public schools and not merely a part of such books.

6. SAME—fixing maximum price for part of text books and not for all is not a discrimination. The fixing by the School Text-book law of 1909 of a maximum price for a part of the text books offered for sale in the public schools but not for all is not such an unreasonable classification or discrimination as renders the act unconstitutional.

7. SAME—School Text-book law of 1909 is invalid because of provision for advertising for bids. Section 6 of the School Text-

book law of 1909, requiring school boards, before adopting text books, to advertise for bids by publishing a notice in one or more newspapers of general circulation "published in the district," means in a newspaper first issued or printed in the district and not elsewhere, and as such provision is impossible of performance it is invalid, and as it is inseparable from the remainder of the act the entire act is invalid.

8. SAME—*classification of school districts, based upon whether or not a newspaper is published there, would be invalid.* Section 6 of the School Text-book law of 1909 was not intended to classify school districts of the State upon the basis of whether or not a newspaper of general circulation is published therein, nor would such a classification be valid were it intended to be made.

9. NOTICE—*what is meant by a newspaper of general circulation.* A newspaper is of general circulation when it circulates among all classes and is not confined to a particular class or calling in the community.

CARTER, C. J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

SCHUYLER, ETTETSON & WEINFELD, (SAMUEL A. ETTETSON, of counsel,) for appellant:

The circuit court had jurisdiction to enjoin the carrying out of the contract in question at the suit of the complainant, who was a tax-payer. Courts of equity will enjoin, at the suit of a tax-payer, any intended misappropriation of the public money or the payment of such money on an illegal contract. *Adams v. Brennan*, 177 Ill. 194; *Holden v. Alton*, 179 id. 318.

An investigation concerning the constitutionality of an act of the legislature begins with the presumption that the act is valid, and all doubts or uncertainties arising either from the language of the constitution or the act must be resolved in favor of the validity of the act, and the court will only assume to declare it void in case of a clear conflict with the constitution. The duty of the court is to so construe acts of the legislature as to uphold their constitu-

tionality and validity if it can reasonably be done, and if their construction is doubtful the doubt will be resolved in favor of the law. The act in question is not in any way in contravention of either the constitution of Illinois or that of the United States. *Gaines v. Williams*, 146 Ill. 450; *People v. Gault*, 149 id. 39; *People v. Rose*, 203 id. 46; *People v. McBride*, 234 id. 146.

The legislature is the supreme law-making body of the State. Section 1 of article 8 of the present constitution provides as follows: "The General Assembly shall provide a thorough and efficient system of free schools whereby all children of this State may receive a good common school education." The act in question was passed in pursuance of this provision of the constitution and is not in contravention thereof. The judgment of the legislature in this regard is sovereign and final and cannot be revised by the courts. The courts may look to see whether the act is in conflict with the constitution, but have nothing to do with the wisdom or unwisdom, with the expediency or in expediency, of this particular enactment. *Chicago v. Green*, 238 Ill. 258; *Currer v. Merrill*, 25 Minn. 1; *State v. Hawthorth*, 122 Ind. 462; *Leeper v. State*, 103 Tenn. 500.

The decree of the circuit court was erroneous in finding that the act of 1909 was discriminatory because of its provision for advertising for bids. This provision is general in its terms, and even if there should be school districts in which there could be no advertising because of lack of a newspaper of general circulation, such fact would not make the act discriminatory, because all districts in like circumstances (as to having newspapers) would be governed by the same regulations. *Soap Co. v. Chicago*, 234 Ill. 314; *Saylor v. Ducl*, 236 id. 429; *Potvin v. Johnson*, 108 id. 70.

The word "published," as used in the act, means given or sent forth to the public. The obvious intent of the clause is to require public notice, and the meaning of the

word "published" cannot be limited. 7 Words and Phrases, 5847; 32 Cyc. 1258; *State v. Bass*, 97 Me. 484.

As the meaning of the word "published" is obvious and the intent is plainly to require publicity, it may be ignored for the purpose of effectuating the legislative intent and the provision may be treated as though the word were not contained in it. *People v. Harrison*, 191 Ill. 257; *Walker v. Springfield*, 94 id. 364; *People v. Hoffman*, 97 id. 234.

Even should the court hold invalid the provision for advertising, still it is separable from the remainder of the statute, and such invalidity will not affect the valid parts of the statute which are complete and enforceable by themselves. *Myers v. People*, 67 Ill. 503.

LACKNER, BUTZ & MILLER, for appellee Rand, McNally & Co.:

The act in question is unconstitutional because it prohibits the use in public schools of unlicensed books but provides no means for securing the licensing of books, and thereby, in effect, enacts that all the schools of this State be closed. *Cooley's Const. Lim.* (7th ed.) 245; *Powell v. Board of Education*, 97 Ill. 375.

The School Text-book act is impossible of performance because ninety-four per cent of the school districts of the State have no newspaper published therein. To provide means for securing competitive bids in six per cent of the districts, only, leaving the other ninety-four per cent of the districts without such means; is grossly discriminative. *Tonawanda v. Price*, 171 N. Y. 415; *Leroy v. Jamison*, 15 Fed. Cas. 373; *State v. Bass*, 97 Me. 484; *People v. Olson*, 204 Ill. 494; *Cooley's Const. Lim.* (7th ed.) 247.

The act in question requires only about one-half of the books used in the public schools to be licensed and fails to require the licensing of certain books required by statute to be used in the public schools. Therefore it imposes heavy burdens upon the publishers of certain school books

which burdens are not imposed upon publishers of other public school books used and required to be used in the public schools. Hurd's Stat. chap. 122, pars. 187, 190; Cooley's Const. Lim. (7th ed.) 586; id. (6th ed.) 481; *Railway Co. v. Ellis*, 165 U. S. 150; *Horwich v. Laboratory Co.* 205 Ill. 495; *Manowsky v. Stephan*, 233 id. 409; *Coal Co. v. Harrier*, 207 id. 624; *Mathews v. People*, 202 id. 389; *Gillespie v. People*, 188 id. 176; *Eden v. People*, 161 id. 296; *Millett v. People*, 117 id. 294; *Frorer v. People*, 141 id. 171; *Ramsay v. People*, 142 id. 380; *Off & Co. v. Morehead*, 235 id. 40; *Coal Co. v. People*, 147 id. 66.

The act, under the guise of an exercise of the police power, places burdens upon the publisher which do not tend to protect the public health, morals, safety or welfare, and the act therefore cannot be sustained as an exercise of the police power. Const. of Ill. art. 2. sec. 2; Const. of U. S. 14th amendment; *People v. Steele*, 231 Ill. 345; *Railway Co. v. Jacksonville*, 67 id. 37; *Chicago v. Netcher*, 183 id. 104; *Massie v. Cessna*, 239 id. 352; *Noel v. People*, 187 id. 587; *Booth v. People*, 186 id. 43; *Gillespie v. People*, 188 id. 176; *Saddler v. People*, 188 id. 243; *Besette v. People*, 193 id. 334; *Price v. People*, 193 id. 114; *Frorer v. People*, 141 id. 171.

The exclusion of unlicensed text-books from the bidding is an unlawful discrimination, making the act in question unduly oppressive and burdensome. *Chicago v. Gunning System*, 214 Ill. 628; *Hawes v. Chicago*, 158 id. 653.

FRANK HAMLIN, and ANGUS ROY SHANNON, for appellee the Board of Education of the City of Chicago.

MR. JUSTICE FARMER delivered the opinion of the court:

The bill in this case was filed by appellant, Paul E. Polzin, as a tax-payer in the city of Chicago, against the board of education of said city and Rand, McNally & Co., also of

the city of Chicago, and other defendants not necessary to be named. The bill alleges that in September, 1909, the board of education adopted for use in the public schools of the city of Chicago, Dodge's Advanced Geography and Dodge's Elementary Geography, published by Rand, McNally & Co., and entered into a contract with said Rand, McNally & Co. whereby said publisher agreed to furnish said school text books to said board of education and to the pupils of said schools at maximum prices in said contract specified. The bill further alleges that said text book has never been licensed as required by an act of the legislature of 1909, entitled "An act in relation to the adoption, use and price of public school text books in the free public schools of this State." The Governor refused to approve the act but failed to return it to the General Assembly during its session with his veto, and failed to file the bill, with his objections thereto, in the office of the Secretary of State within ten days after the adjournment of the General Assembly. The bill therefore became a law without the Governor's signature and went into effect July 1, 1909. The contract between the board of education and Rand, McNally & Co. was for furnishing by the latter Dodge's Advanced Geography to the board of education, or to persons designated by it, at the price of seventy-two cents or to pupils at the price of ninety cents, and Dodge's Elementary Geography to the board of education, or to persons designated by it, at the price of thirty-five cents and to pupils at the price of forty-five cents. The bill alleges that under said act of 1909 the said contract between the board of education and Rand, McNally & Co. is unlawful, and prays an injunction against both parties restraining them from carrying out and performing it.

The answer of the board of education admits failure to comply with the provisions of the act of 1909, and alleges that since the enactment of said law no publisher of any text book has complied with its provisions by licensing any

geography or other school text book, except an arithmetic; that said law is operative only when the publishers voluntarily place themselves under its provisions, and by the failure of publishers to do this the law became and is inoperative, and said board of education was confronted with the alternative of obeying the strict letter of the law by buying no text books, thereby closing the public schools, in violation of its duty under the constitution to maintain said schools, or arranging for such temporary use of such text books as in the judgment of said board was deemed best, so as to perform its duty, under the constitution, to maintain an efficient public school system within its jurisdiction; that at its meeting September 7, 1909, the board of education adopted resolutions setting out this condition; that among other things the resolution recited "that during the emergency created by the conditions hereinbefore set forth, this board temporarily use such text books as in its opinion are necessary and best for the operation of the schools, and purchase the same in such quantities as they are needed, at the lowest obtainable prices." The answer of Rand, McNally & Co. relies as a defense upon the unconstitutionality of the act of 1909.

The cause was heard in open court upon bill, answers and replications, oral testimony and a stipulation of facts. The chancellor found and decreed that said act is unconstitutional and dismissed the bill at complainant's costs, and complainant has brought the case to this court by appeal.

Section 1 of the act of 1909 requires the publisher of any text book desiring to offer the same for sale for use in the public schools of this State to file two sample copies of such book in the office of the Superintendent of Public Instruction, together with the list price and the wholesale and retail prices at which said text book is to be offered for sale. The publisher is also required to file with the Superintendent of Public Instruction a written agreement to furnish said text book at the wholesale price so filed, to

the directors of any public school district or any board of education or to any merchant or dealer, and at the retail price so filed, to any patron of the public schools. The agreement is required to guarantee that all books offered for sale and sold in this State shall correspond with and be equal in quality with the copies deposited with the Superintendent of Public Instruction. With such text book so deposited the publisher is required to pay into the State treasury \$10, to constitute a fund to be used by the Superintendent of Public Instruction to pay expenses of printing and distributing lists of accredited text books to county superintendents of schools, school directors and boards of education, as required by section 5 of the act. Section 1 forbids the Superintendent of Public Instruction from licensing any publisher, and school directors and boards of education from contracting with any publisher, to furnish any public school text book which shall be sold at retail prices to patrons at a price or prices in excess of the prices fixed for text books enumerated in said section. Then follows a list of maximum prices for text books upon the subjects enumerated. The price of "complete geography" is fixed at seventy-five cents and "elementary geography" at thirty-five cents.

Section 3 requires the publisher depositing with the Superintendent of Public Instruction any text book, to file with said superintendent a bond in the sum of \$5000 conditioned for compliance with the agreement filed with said text book, and the Superintendent of Public Instruction shall thereupon enter said text book upon the list of public school text books permitted to be used in the public schools of this State and shall issue a license to the publisher to sell said text book for use in said public schools. For a violation of the agreement the publisher is liable to a penalty in the sum of \$2000, to be recovered in an action on the bond in the name of the State.

Section 5 requires the Superintendent of Public Instruction, in February of each year, to furnish county superintendents, boards of school directors and boards of education a list of publishers who have conformed to the requirements of the act, a list and description of accredited school text books and the list prices and wholesale and retail prices of said books. Said section 5 also requires the publisher, before entering into any contract with any board of education or board of directors, to furnish the county superintendent of schools and the secretary of the board of education or board of directors a duplicate printed list of school text books filed by him with the Superintendent of Public Instruction, together with the lowest wholesale and retail prices, and also with samples of the school text books in said list referred to, which lists and samples are required to be preserved as a part of the records of the board of education or board of directors for inspection and examination by school officers, teachers and patrons.

Section 6 is as follows: "Before adopting for use in the public schools under their respective jurisdictions any school text books under the provisions of this act, it shall be the duty of each board of education or board of directors to advertise for bids by publishing a notice once a week for three consecutive weeks in one or more newspapers of general circulation published in the city or district; said notice shall state the time up to which said bids will be received, the time at which they will be opened, which must be at an open meeting of the board of education or board of directors; said notice shall also state the classes and grades for which the text books are to be bought, and the approximate quantity needed; and the said board shall award the contract for said text books to any responsible bidder or bidders offering suitable licensed text books at the lowest prices, taking into consideration the quality of the material used, illustrations, binding, printing, authorship, and all other things that go to make up a desirable

text book: *Provided*, that the said board may reject any and all bids, or any part thereof, and re-advertise therefor, as above provided."

Section 8 provides a penalty of not less than \$25 nor more than \$500, to which may be added imprisonment not exceeding sixty days in jail, against any publisher, merchant, dealer or other person or persons for demanding or receiving for any school text book any sum in excess of the price for such book filed with the Superintendent of Public Instruction. And section 9 provides that text books shall not be changed oftener than once in five years and shall not be changed in the middle of the school year, and that all changes shall go into effect at the beginning of the first term of school after the summer vacation. Other sections and provisions not referred to are not involved in the decision of this case.

In the brief filed on behalf of the board of education the constitutionality of the act in question is not discussed. The position taken by said board is, that no publisher has complied with the act by securing a license for books desired and necessary to be used in the public schools under its control; that no means are provided for compelling the licensing of said books, and that the board was obliged to procure them for use in the public schools or close said schools, as they could not be conducted without the use of text books. Rand, McNally & Co. (hereafter referred to as appellee) contends that as the law prohibits the use in the public schools of text books not licensed under its provisions and affords no means for securing the licensing of them, the effect of the law is to close the public schools if publishers do not choose to secure the licensing of books, and the law is therefore invalid because it defeats the constitutional mandate of section 1 of article 8 of the constitution.

First—It is the constitutional duty of the General Assembly to provide a thorough and efficient system of free

schools, whereby all children of this State may receive a good common school education. (Const. art. 8, sec. 1.) Any act of the legislature which would make inoperative and render ineffectual laws adopted for the establishment and maintenance of an efficient system of free schools would be invalid. But is that the necessary effect of the act under consideration, as contended by the appellee? The State has the undoubted right to regulate the adoption and price of text books used in the public schools. This has been decided in several States and we do not understand it is questioned in this case. If the publishers should comply with the law no difficulty could arise in procuring licensed text books required for use in the public schools. The possibility that they will not comply with it may go to the wisdom of the law but we think not to its constitutionality. The wisdom of an act is a legislative question, and however unwise it may be thought to be, unless it violates some provision of the fundamental law it cannot be held invalid. We do not think the validity of the act before us depends upon whether or not publishers will comply with its provisions. The legislature had the right to assume they would, and requiring the licensing of all public school text books offered for sale in this State was a provision in aid of the power to regulate the adoption and price of such books. It may be that this power could be exercised by other methods, but the provision referred to was in aid of the power and not contrary to the constitution. We would be very loath to hold that in any case the validity of an act of the legislature should be determined by whether an individual or corporation affected by it would comply with its provisions. The provision requiring text books offered for sale in this State to be licensed is not different, in principle, from the requirement of section 176 of the School law that only persons having a license or certificate from the county superintendent of schools or the Superintendent of Public Instruction shall be employed to teach in the

public schools. The possibility that no one might apply for and undergo the examination required for a certificate has never been thought to render the law in that regard invalid. We have laws authorizing public work to be let by contract to the lowest bidder, yet the possibility that when bids are advertised for no one will make a bid does not render the law invalid. Other illustrations of similar character might be given. It is true, that up to the time this litigation arose only an arithmetic had been licensed under the provisions of the law; but are we to assume from this that publishers desiring to sell school text books in this State, protected by and exercising rights under our laws, will persist and continue in refusing to perform the acts required of them to entitle them to lawfully sell their books? The legislature could not compel publishers to license their books if they chose not to offer them for sale in this State, but it had the power, as a condition precedent to their right to sell them for use in the public schools of this State, to require them to license them. We are not impressed with the proposition that publishers may, by defying the power of the legislature and ignoring the law, render it invalid. It would be much better that the schools should be temporarily interrupted than that such should be declared to be the effect of the refusal of publishers to comply with the law. The State is not so powerless in the matter of providing school text books as to be at the mercy of the publishers.

Second—Appellee contends that the act requires only a part of the text books used in the public schools to be licensed and does not require the licensing of other text books required to be used in the public schools, thus imposing heavy burdens upon publishers of certain text books that are not imposed upon the publishers of other text books, and that the act is discriminative between publishers and also between patrons of the public schools. So far as the contention states that the act requires the licensing of

part of the text books but not of all, it is erroneous. The act requires the licensing of all text books offered for sale for use in the public schools of this State. It also requires that the publishers file with the Superintendent of Public Instruction a list price and the wholesale and retail prices at which the text books are to be sold, together with an agreement in writing to furnish the books at the prices listed. Section 1 provides that the Superintendent of Public Instruction shall not, in any case, license a publisher, and boards of education and boards of directors are prohibited from contracting with any publisher, to furnish any text book which shall be sold at retail to patrons at prices in excess of those specified in the said section. The statute (Hurd's Stat. chap. 122,) requires instruction to be given in the public schools in history of Illinois, the elements of the natural sciences, and such other branches, including vocal music and drawing, as may be prescribed by the directors or the voters of the district at the annual election of directors. The elements of the natural sciences embrace botany, zoology and physics. Text books upon these subjects are required by the act under consideration to be licensed but said act fixes no maximum price at which they are to be sold. Publishers of text books on the history of Illinois, botany, zoology and physics may sell such books (provided they are licensed) to any merchant, dealer, patron or board of education or board of directors at any price the publisher may fix, limited only to the price list filed with the superintendent of public instruction when applying for the license. We do not regard this as an unreasonable classification or discrimination or in violation of any other constitutional provision.

Third—It appears from the stipulations of facts that there are 11,820 school districts in the State and that in 11,198 of them no newspaper is published. Section 6 requires boards of education and boards of directors, before

adopting text books for use in the schools, to advertise for bids "by publishing a notice once a week for three consecutive weeks in one or more newspapers of general circulation published in the city or district." Said section prescribes what said notice shall contain, and requires the contract to be awarded "to any responsible bidder or bidders offering suitable licensed text books at the lowest prices, taking into consideration the quality of the material used, illustrations, binding, printing, authorship, and all other things that go to make up a desirable text book." The provisions of this section are incapable of being complied with if the act is to be construed as meaning what it says, that bids shall be advertised for "in one or more newspapers of general circulation published in the city or district."

Appellant contends (1) that the fact that in some districts no newspaper is published should not render the law invalid because it applies to all districts in which a newspaper is published, and therefore applies alike to all districts under similar circumstances; (2) that the act does not mean the advertisement shall be published in a newspaper printed or issued in the district, but means it shall be in a newspaper circulated in the district, and that the word "published" should be omitted from said section 6. As to the first proposition it is unnecessary to say more than that it is evident there was no intention on the part of the legislature to make any classification of districts with reference to publication of the advertisement for bids, and there is no valid basis for such classification if any such intention were indicated by the language of the act. It would have been competent to have made provision similar to that of the act to regulate the practice in courts of chancery for publication notice to non-resident defendants where no newspaper is printed in the county where the suit is brought, but the language used in the act before us forbids the construction that the legislature meant by "published" in the district "circulated" in the district. We apprehend no one would contend that

it was intended to authorize advertisement in a newspaper circulated, but not published, in a district in which there was a newspaper of general circulation published. Yet if the act is construed as appellant contends for, we see no reason why the advertisement could not be published in any newspaper published outside the district but of general circulation in the district, although there might be one or more newspapers published in the district. A newspaper is of general circulation when it circulates among all classes and is not confined to a particular class or calling in the community. (*Railton v. Lauder*, 126 Ill. 219.) Chicago and St. Louis papers have a general circulation in many cities and school districts throughout this State and papers published in other cities and States circulate in Chicago, but the legislature could not have intended that boards of education of Springfield or Cairo could advertise for bids in Chicago or St. Louis newspapers. The language of section 6 is too plain and explicit to admit of the construction contended for by appellant. If it had been intended that publication in a newspaper of "general circulation" in the district should be a compliance with the law, the legislature would not have required that the publication be made not only in a newspaper of general circulation in the district, but also in a newspaper "published" in the district. By the word "published" is clearly meant the place where the newspaper is first issued or printed, to be sent out by mail or otherwise. (*LeRoy v. Jamison*, 15 Fed. Cas. 373, opinion by Mr. Justice Field; *State v. Bass*, 97 Me. 484; *Village of Tonawanda v. Price*, 171 N. Y. 415.) Section 6 is an important provision in carrying out the object and purpose of the act, and other provisions are so related to and dependent upon the said section that without it the act would not be complete for the purpose intended. To eliminate section 6 from the act would cause results not contemplated or desired by the legislature. In such cases the

entire act must be held inoperative. *People v. Strassheim*, 240 Ill. 279, and authorities there cited.

It is also contended that the act is unduly oppressive and burdensome upon publishers of public school text books. This is not apparent from an inspection of the act itself, nor was it shown by the proof that in its practical operation it is unduly oppressive and burdensome.

For the reasons stated in division 3 of this opinion we hold the act of 1909 is unconstitutional and invalid.

The decree of the circuit court is affirmed.

Decree affirmed.

Mr. CHIEF JUSTICE CARTER, dissenting:

I think the decree in this case should be reversed. I agree with the reasoning of the opinion in all respects except in its holding that the decree of the circuit court rightly held that the law was unconstitutional because of the provisions of section 6 with reference to advertising for bids. This court has held that where the literal enforcement of the statute would cause great inconvenience and great injustice and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended and adopt a construction which will promote the ends of justice and avoid the absurdity. (*People v. Harrison*, 191 Ill. 257.) The construction put upon said section 6 in the opinion of the court reaches conclusions that the legislature certainly never contemplated. The meaning of the section obviously is to require publicity. The word "publish" may be ignored for the purpose of effectuating the legislative intent and the provision treated as though that word were not contained in the section.

JETTIE RICHARDSON, Appellee, vs. ESDRAS B. TRUBEY,
Appellant.

Opinion filed June 20, 1911.

1. APPEALS AND ERRORS—*a bankrupt may appeal from an order directing a sale of his homestead.* A person may appeal from an order of the court directing the sale of his homestead without his consent and the payment of its value to him according to mortality tables, even though he may have a trustee in bankruptcy, as such trustee has no concern with exempt property.

2. SAME—*master's report is part of the record without any certificate of evidence.* The report of the master in chancery before whom the testimony in a partition case is taken is a part of the record without any certificate of evidence.

3. WILLS—*a person cannot claim under part of will and reject the remainder.* A party cannot claim under the will as to a part of the property devised to him and reject the will as to the remainder and claim under the statute.

4. SAME—*when person is bound by election to take under the will.* A person who has the right to take under a will or the statute is entitled to know the condition of the estate before making his election, but if he knows the condition of the estate and does not renounce the provisions of the will after receiving the notice provided for by the statute, but, on the contrary, claims a part of the property under the will, his election to take under the will is binding upon him.

5. PARTITION—*rule where party entitled to homestead does not consent to its sale.* Where homestead premises are not susceptible of division the owner of the homestead estate may, by written assent, agree to its sale, in which case the estate is sold for its present value and the amount is paid to the owner; but the homestead estate cannot be sold for its present value without his consent, and in such case a court of equity will require the payment to him of \$1000 in money in lieu of his right of occupation of a homestead of that value. (*Powell v. Powell*, 247 Ill. 432, followed.)

6. SAME—*rule where dower cannot be assigned without injury and there is no assent to sale.* Where property in which one has dower cannot be divided so as to assign dower without great injury to the whole, proceedings may be had under section 39 of the Dower act, but there is no warrant in law for selling the dower interest without the written assent of the person entitled thereto, given as provided in the Partition act.

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

H. W. STANDIDGE, for appellant.

LOUIS J. PIERSON, and GEORGE A. MILLER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Luella B. Trubey died on June 3, 1905, leaving a last will and testament, of which the appellee, her niece, Jettie Richardson, was executrix. On August 3, 1905, the appellant, Esdras B. Trubey, her surviving husband, filed his bill in the circuit court of Cook county to contest the will. There was a verdict, followed by a decree, sustaining the will, and that decree was affirmed by this court. (*Trubey v. Richardson*, 224 Ill. 136.) The appellant, as administrator to collect, also began a proceeding in the probate court of Cook county against Arthur B. Pease to compel the delivery of personal property alleged to belong to the estate, and that litigation ended with the affirmance of the judgment of the Appellate Court, holding that the property was property of the estate. (*Trubey v. Pease*, 240 Ill. 513.) On January 24, 1908, the appellee filed her bill in this case in the circuit court of Cook county against the appellant and others for partition of the real estate devised by the will. A decree was entered, which was reversed on appeal and the cause was remanded to the circuit court for further proceedings consistent with the views expressed in the opinion then filed. (*Richardson v. Trubey*, 240 Ill. 476.) After the cause was re-instated in the circuit court the appellee filed a substituted and supplemental bill of complaint on January 25, 1910, to which bill the appellant demurred, and his demurrer being overruled he answered the bill. The issue was referred to a master in chancery to

take the proofs of the respective parties and report his conclusions upon the law and the facts. The master took the evidence and made his report, recommending a decree for the assignment of homestead and dower to the appellant and a partition of the premises, and providing that if it was not possible to assign the homestead or dower, the same should be sold and the present value of the homestead, according to the mortality tables, be paid to the appellant, and the balance of the value of the dower, above encumbrances, tax sales and tax liens, be paid to his trustee in bankruptcy. The cause was heard on exceptions to the report and the court entered a decree in accordance with said report, appointing commissioners to assign the homestead and dower and partition the real estate. If the premises were not susceptible of division the commissioners were directed to report the value of each piece or parcel, and the premises were to be sold, including the homestead and dower, and the values were to be paid to the appellant and his trustee, as recommended by the master. The case has again been brought to this court by appeal.

The appellee has moved to dismiss the appeal, and as grounds of the motion her counsel say that under the former decision in this case the appellant's rights are limited to homestead in the family home and dower in the residue of the real estate; that the decree appealed from gives appellant the homestead, so that he cannot appeal with respect to that part of the decree; that the remaining interest is in Harry G. Wexler, trustee in bankruptcy of the appellant, who has the sole right of appeal if dissatisfied with the decree respecting dower, and that the abstract does not show that all the evidence upon which the decree rested is before the court. The master's report finds that the original bill was filed on January 11, 1909; that appellant filed his voluntary petition in bankruptcy on April 6, 1910, and that Harry G. Wexler was appointed trustee of his estate

on May 26, 1910, and duly qualified and acted as such trustee. The decree follows the findings of the master, but they are not supported by any evidence. The abstract of the record shows that on June 16, 1910, after the reference to the master, an order was entered giving Harry G. Wexler leave to file an intervening petition as trustee in bankruptcy of appellant and substituting such trustee as defendant in place of appellant. The intervening petition was filed but the order was set aside on August 4, 1910, and appellant was ruled to answer the petition. An answer was filed denying the appointment of Wexler as trustee or his qualification as such, and disputing his right as trustee for appellant. On August 15, 1910, Wexler filed exceptions to the answer of appellant and nothing further appears. There was no evidence that Wexler was trustee in bankruptcy or that there was any proceeding in the District Court of the United States. So far as appears the trustee did nothing in the case, and he filed no objections before the master and made no contest before the court. The right to dower, as well as homestead, is by the record in appellant, but if there was a trustee, appellant has a right to question the order of the court for the sale of his homestead without his consent and the payment of its value to him according to mortality tables, since the trustee in bankruptcy has no concern with exempt property. The abstract shows the report of the master before whom the cause was heard, and it is a part of the record without any certificate of evidence. The suggestion that it is not shown that no oral testimony was heard before the court is without force, for the reason that none could have been heard. The motion to dismiss the appeal is denied.

After the cause was re-instated in the circuit court, the appellant, on July 7, 1909, filed in the office of the clerk of the probate court the renunciation of the will provided by section 12 of the Dower act, and elected to take in lieu of

dower one-half of all the real and personal estate which should remain after the payment of just debts and claims. The court found that this attempted renunciation was void, and it is contended that the court erred because we held on the former appeal that appellant could still renounce the will and the cause was remanded for further proceedings consistent with that view. Counsel misinterprets the opinion in which we held that appellant took by the will and not by the statute, and in explanation stated what his rights would have been if he had made an election under the Dower act. We did not decide that he could still renounce the provisions of the will and his right to election had already been barred. The letters testamentary were issued to appellee on or about July 19, 1905. She served on appellant a written notice on February 24, 1906, that all claims against the estate as filed and allowed in the probate court had been fully paid, and that he should make his election to take under the will or renounce its provisions within two months from the service of the notice. All claims against the estate had been paid and no other claims were filed in the probate court until December, 1909, nearly four years after the notice, and which could only participate in after-discovered property. The notice was in compliance with the statute and the appellant did not avail himself of the right to make an election. Afterward, on June 29, 1907, he filed in the probate court a sworn answer to a petition for a surrender of specific property in his possession, and he set up that under the terms of the will the property was bequeathed to him and he claimed possession by virtue of the bequest. He could not claim that property under the will and reject the remainder and claim under the statute. (*Lessley v. Lessley*, 44 Ill. 527.) One who is permitted to take under a will or the statute is entitled to know the condition of the estate before making an election, and it is the intention of the statute that such should be the case;

but here the appellee not only complied with the statute, but appellant, knowing the condition and the amount of the estate, elected to take under the will by claiming the property given to him by it. He was the surviving husband of the testatrix and had been her agent in the management of her property and after her death was administrator to collect and carried on the contest of the will and litigation with Pease, and he is bound by his election. *Stone v. Vandermark*, 146 Ill. 312.

In the decree which was reversed on the former appeal the commissioners were not specifically directed to set off the homestead. In the present decree they are so directed, but if they find the premises are not susceptible of division they are to report the value and the homestead premises are to be sold. In case of a sale and confirmation of the report the appellant is ordered forthwith to surrender possession and is to be paid the value of his homestead according to the mortality tables. There is no warrant in the law for selling a homestead estate and giving to the owner its present value without his consent. If the owner chooses to do so he may, by written assent filed in the court where the proceedings for partition are pending, agree to the sale of his estate with the rest of the property, and in such case the estate is sold for its present value, which the owner receives. (*Merritt v. Merritt*, 97 Ill. 243.) It does not appear that the appellant filed his consent, in writing, to the sale of his homestead estate, and the court had no right to order a sale of the same and to require the appellant to surrender possession on the confirmation of the sale. It is true that courts of equity, in order to prevent injustice resulting from the occupation of premises of much greater value by one who has an estate therein to the extent of only \$1000, have required the surrender of possession by the one entitled to the homestead upon payment of \$1000 to such owner, but he cannot be required to sell it

and receive the present value without his consent. What he is entitled to is the occupation of a homestead of the value of \$1000, and, by analogy to cases where a homestead may be sold under execution or to satisfy liens, a court of equity will order the payment to him of that sum of money, which will enable him to acquire another homestead and thereby have what he is entitled to. (*Powell v. Powell*, 247 Ill. 432.) To take a homestead from one entitled to it and give him what it sells for, without his consent to such arrangement, would be to defeat the purpose of the statute and give to the party money instead of a right to occupy exempt property. With respect to dower, the last decree directed an accounting, and in case of a sale the payment of the value of the dower to Wexler, as trustee in bankruptcy. There was no evidence that he was trustee or had any right to the money, but, as was said with reference to the former decree respecting dower, the directions of the present one are not authorized by our laws. When property in which one has dower cannot be divided so as to assign the dower without great injury to the whole, proceedings may be had under section 39 of the Dower act, but there is no warrant in the statute for selling the dower interest without the consent of the one entitled to dower, given as provided in the Partition act. As there was no consent to the sale of the dower interest the court erred in ordering a sale of the same.

The decree is reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

THE NATIONAL SAFE DEPOSIT COMPANY, Appellant, vs.
WILLIAM H. STEAD, Attorney General, et al. Appellees.

Opinion filed June 20, 1911—Rehearing denied October 4, 1911.

1. BAILMENTS—*relation between a safety deposit company and lessee is that of bailee and bailor.* Where a safety deposit company leases a deposit box or safe and the lessee takes possession thereof and places his property therein the relation of bailee and bailor is created, and the fact that the company does not, and is not expected to, know the character and description of the property deposited does not change that relation, and the law applicable to bailments, generally, applies to the transaction and the property.

2. SAME—*duty of a safety deposit company to deliver property upon death of lessee.* Upon the death of the lessee of a safety deposit box or safe the contents of such box or safe are in the possession and control of the lessor company, and the common duty of a bailee rests upon it to deliver the property to the party or parties upon whom the law casts the title, with right of possession.

3. INHERITANCE TAX—*the right to succeed to property is purely statutory.* The right to take property, either real or personal, by inheritance or by bequest or devise is a purely statutory right and one which rests wholly within legislative enactment, and the State, acting in its sovereign capacity, may by appropriate legislation control the devolution of property after the death of the owner.

4. SAME—*inheritance tax is a tax upon the right of succession.* An inheritance tax is a tax upon the right to succeed to property upon the death of the owner and is not a tax upon property itself.

5. SAME—*the State has a vested financial right in estate of decedent.* The State has a vested financial right in the estate of every decedent in this State which is subject to the payment of an inheritance tax, and such right is equal in degree to that of the personal representative, the heir or devisee of the decedent, and it vests at the same time that the interest of the personal representative, heir or devisee vests.

6. SAME—*State has right to know what property is in a safety deposit box of deceased lessee.* Where a lessee of a safety deposit box or safe dies leaving property therein, the State, by its proper representative, has the right to be advised as to the amount and character of the property and of the time it will be surrendered by the safety deposit company to the personal representative, heir or devisee of the decedent, in order that it may know whether the succession to such property is subject to an inheritance tax.

7. SAME—*provision of section 9 of Inheritance Tax law requiring notice to State is valid.* The provision of section 9 of the Inheritance Tax law which requires the representative of the State to be given notice of the time when property in the safety deposit box or safe of a deceased lessee is to be delivered by the safety deposit company to the personal representative, heir or devisee of the decedent is not an unreasonable measure to protect the State from loss of property in which it has a vested right, nor does it deprive the company, personal representative, heir or devisee of any constitutional right.

8. SAME—*provisions of section 9 making a safety deposit company liable if it violates the law are not invalid.* The provisions of section 9 of the Inheritance Tax law making a safety deposit company liable for any inheritance tax upon the right of succession to property in the box or safe of a deceased lessee which it delivers to the personal representative, heir or devisee of the decedent without observing the provisions of the law designed to protect the interest of the State, and which authorize the imposition of a penalty upon the company, are not invalid, as the courts may be resorted to if there is any doubt as to the liability of an estate to the tax.

9. SAME—*section 9 of Inheritance Tax law is valid in so far as it concerns sole lessees.* Section 9 of the Inheritance Tax law of 1909 (Hurd's Stat. 1909, p. 1897,) is a valid enactment, so far as it applies to property of a sole lessee who has died leaving his property in the safety deposit box or safe in the possession and control of the safety deposit company from which he has rented the box or safe.

10. SAME—*section 9 of the Inheritance Tax law is not invalid where there are joint lessees.* Section 9 of the Inheritance Tax law of 1909 is not unconstitutional when applied to property of a deceased lessee in a safety deposit box or safe rented by him and other persons jointly, whether the property of such joint lessees has been kept separate by its respective owners or whether the property of the joint lessees has been commingled or is jointly owned by them.

11. SAME—*section 9 of Inheritance Tax law is not invalid as applied to partnership property.* Section 9 of the Inheritance Tax law of 1909 is not unconstitutional when applied to a case where a safety deposit box or safe has been rented by a co-partnership and one member has died leaving partnership property in the box or safe, as the death of the partner works a dissolution of the firm and the inheritance tax due the State will be assessed only upon the succession to what is due the deceased partner's estate after the partnership debts are paid.

12. SAME—*section 9 of Inheritance Tax law does not infringe upon charter rights of safety deposit company.* Section 9 of the Inheritance Tax law of 1909, which, in effect, only requires that safety deposit companies shall not deliver the property of deceased lessees to their personal representatives, heirs or devisees without notice to the State, or, if subject to an inheritance tax, without retaining enough of the property to pay the tax, does not infringe upon the charter rights of such safety deposit companies.

13. SAME—*section 9 of Inheritance Tax law does not deprive safety deposit companies of property without due process of law.* In view of the fact that the relation between a safety deposit company and its lessee is that of bailee and bailor, and that the State must be regarded as having a vested financial interest in the lessee's deposit, after his death, in case the right to succeed thereto is subject to an inheritance tax, section 9 of the Inheritance Tax law of 1909 cannot be said to deprive safety deposit companies of property without due process of law or to make them trustees or tax-gathering agents for the State without their consent.

14. SAME—*section 9 does not subject the property of lessees of safety deposit companies to unreasonable searches and seizures.* Section 9 of the Inheritance Tax law of 1909, in requiring notice to the representative of the State in order that he may be present when the contents of a safety deposit box or safe of a deceased lessee are surrendered to his personal representative, heir or devisee, is not invalid, as subjecting the property of the lessee to unreasonable searches and seizures.

15. SAME—*section 9 does not take property of deposit company and lessee without compensation.* The leases of a safety deposit company of its boxes or safes, and the rent therefor, must be regarded as contemplating the contingency that there may be some delay after the death of a lessee in delivering the property to those entitled thereto, and the holding of the property by the safety deposit company while carrying out the provisions of the Inheritance Tax law is not, therefore, the devoting of property of the company and its lessees to public use without just compensation.

FARMER, VICKERS and COOKE, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

This was a bill in chancery filed by the National Safe Deposit Company, the appellant, against William H. Stead, Attorney General, Andrew Russel, State Treasurer, and

Walter K. Lincoln, inheritance tax attorney, the appellees, in the circuit court of Cook county, to restrain said officers from enforcing against the appellant, and all other corporations, firms and individuals similarly situated and who are engaged in the business of renting safety deposit boxes and safes for hire, the provisions of section 9 of an act entitled "An act to tax gifts, legacies, inheritances, transfers, appointments and interests in certain cases and to provide for the collection of the same, and repealing certain acts therein named," approved June 14, 1909, in force July 1, 1909, (Hurd's Stat. 1909, p. 1897,) on the ground that said section of the act is unconstitutional and void. A general demurrer was interposed to the bill and sustained and the bill was dismissed for want of equity, and the record has been brought to this court by the complainant by appeal, for further review.

Section 9 reads as follows: "If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or non-resident or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or

transfer be served upon the State Treasurer and Attorney General at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the State Treasurer and Attorney General consent thereto in writing. And it shall be lawful for the State Treasurer, together with the Attorney General, personally or by representatives, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of one thousand dollars; and the payment of such tax and interest thereon, or of the penalty above described, or both, may be enforced in an action

brought by the State Treasurer in any court of competent jurisdiction."

The sole object in filing this bill was to test the constitutionality of said section 9 of the Inheritance Tax law of 1909. The allegations of the bill are, in substance, as follows: That appellant was in 1881 incorporated under the laws of this State for the express purpose of providing a suitable building or buildings with vaults and safes, with a special regard to protection against loss by fire, robbery or otherwise, and to carry on the business of safety deposit and storage, and has ever since been engaged in carrying out such purposes; that it has succeeded in building up a large and profitable business, consisting chiefly of renting for hire safe deposit boxes or safes specially constructed for that purpose in its vaults for the safe keeping of money, securities and valuables, one provision in the contract between appellant and each box renter being that no one except the renter or his deputy, to be designated in writing on the books of the company, or, in case of death, his legal representatives, shall have access to the box or safe; that appellant now has in its vaults 13,291 safes or safe deposit boxes, of which 9702 are under contracts of rental; that of the latter number, 4104 are rented to and held jointly by more than one individual, each of whom has access to the box of which he is a joint renter and the right to keep property therein, and 316 are rented to and held by business co-partnerships, and that the demand for joint rentals is constantly increasing. The bill further alleged that in the ordinary course of business the safes and boxes can be opened only by the use of two keys, one of which is held by the lessee and the other by appellant, and that it requires the joint act of the customer and appellant to secure access to the contents of a box or safe; that appellant retains no means of access to the box or safe by itself, alone, nor does it possess any knowledge or information, or means of knowledge or information, as to the own-

ership of the contents of the box or safe; that the appellant never by its own act opens a box or safe rented to a customer unless the lessee loses his key or abandons the box or safe; that in case of the loss of the key, appellant, in the presence of the lessee, drills out the lock on the safe or box and replaces it with a new lock and key, and in case of the abandonment of a box or safe by a renter, evidenced by his failure to renew the lease or pay the rent, appellant by the contract of leasing reserves, and sometimes exercises, the right, after reasonable notice to the lessee to withdraw the contents of the box and surrender the key, to open the box by drilling out the lock, to withdraw the contents and hold them subject to the order and disposition of the renter. The bill further alleged that upon the death of the lessee of a box or safe, and before letters of administration have been issued, appellant permits the next of kin having the key to open the box, in the presence of appellant's agents, for the purpose, only, of ascertaining whether decedent has left a will in the box, which, if found, is deposited in the probate court by appellant, and in some instances where the next of kin have represented that they could not find the key to the box the lock has been drilled out and changed, at their request and in their presence, in order to look for such will, but in neither case does appellant permit the removal of anything other than the will from the box. The bill further alleged that appellees claim that under the provisions of section 9 of the Inheritance Tax law of 1909 they have the right to compel appellant and similar institutions to deny to the personal representatives of deceased box renters, and to the survivor or survivors of joint box renters, and to surviving partners of co-partnership box renters, control over and liberty to remove the contents of the safe deposit boxes, or any part thereof, unless notice of the time and place of the intended removal is served upon the State Treasurer and Attorney General at least ten days prior to such removal, and unless

the State Treasurer and Attorney General consent, in writing, to such removal, or a sufficient portion or amount of such contents be retained by appellant to pay any tax and interest which may thereafter be assessed, on account of the taking possession of the contents of such box by the personal representatives of the decedent, or by the survivor or survivors among joint box holders, or by the surviving partners of the decedent if the box was held in the name of a co-partnership; that appellees also claim the right to examine the contents of any such safe deposit box at the time of the removal or taking possession of the contents by the person legally entitled thereto; all of which claims appellant insists are in conflict with the terms and obligations imposed upon it by its contracts with box renters and with the constitutional rights of box renters and their legal representatives, and especially with the constitutional rights of surviving joint or partnership box renters, as said section 9 is in violation of section 10 of article 1 of the constitution of the United States, and of article 4 and of section 1 of article 14 of the amendments to the constitution of the United States, and is also in violation of sections 2, 6, 13 and 14 of article 2 of the constitution of this State, and is therefore, in the particulars above set forth, unconstitutional and void. The bill also contains allegations intended to show the jurisdiction of a court of equity to take cognizance of the matter in order to prevent multiplicity of suits and to prevent irreparable injury to appellant's business.

It is contended by the appellant that its constitutional rights, both State and Federal, are infringed upon by said section of the statute in the following particulars: (1) That it impairs the obligations of its charter; (2) that it deprives it of liberty and property without due process of law; and (3) that it deprives it of the due protection of the law. It is also insisted that its lessees, in addition to being deprived of liberty, property and the equal protection of the law, have (1) their property subjected to unreason-

able searches and seizures, and (2) that their property is devoted to a public use without just compensation. And it is further urged that it is (1) forced to become a trustee and to perform the duties of a trustee without its consent, and that it is (2) required to perform the duties of a tax-assessing and tax-collecting officer without its consent.

GEORGE PACKARD, VINCENT J. WALSH, and JOHN J. PECKHAM, (ORVILLE PECKHAM, of counsel,) for appellant.

W. H. STEAD, Attorney General, and WALTER K. LINCOLN, (CHARLES E. WOODWARD, of counsel,) for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The right of appellant to maintain this bill has not been challenged by the appellees, and it will therefore be assumed, without argument, for the purpose of this appeal, that the allegations of the bill are sufficient to show that a property right of the appellant was involved in the court below and that the bill could be maintained to avoid a multiplicity of suits. *Craft v. Indiana, Decatur and Western Railway Co.* 166 Ill. 580; *Cragg v. Levinson*, 238 id. 69; *Pelton v. National Bank*, 101 U. S. 143; *Cummings v. National Bank*, id. 153; *Hills v. Exchange Bank*, 105 id. 319; *Union Pacific Railway Co. v. Ryan*, 113 id. 526.

The counsel for the appellant and the counsel for the State differ widely and fundamentally upon the relation which the appellant sustains towards its lessees, and the property which its lessees place in the safety deposit boxes and safes which they rent from the appellant, and as to the interest of the State in the property situated in a safety deposit box or safe, placed there by a lessee, upon the death of the lessee, when the property is subject to the payment of an inheritance tax. We think, for the proper decision of this case, the exact relation which the appellant sustains

to a person to whom it rents a safety deposit box or safe, and the property placed in such box or safe by the lessee, and the interest which the State has in the property of a lessee remaining in such safety deposit box or safe upon his death, if such property is subject to an inheritance tax, must necessarily be determined as a preliminary question, as, according to our view, the correct determination of those questions will simplify many of the questions discussed in the briefs and eliminate others, and place the case in such a situation that a rational solution of the question here involved, whose determination is vital to a correct decision of this case, may readily be determined.

We think it clear that where a safety deposit company leases a safety deposit box or safe, and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables, and that the fact that the safety deposit company does not know, and that it is not expected it shall know, the character or description of the property which is deposited in such safety deposit box or safe does not change that relation, any more than the relation of a bailee who should receive for safe keeping a trunk from a bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor, although the obligation resting upon the bailee with reference to the care he should bestow upon the property in the trunk might depend upon his knowledge of the contents of the trunk. Obviously, the bailee would be in possession of the trunk and its contents, and no amount of argument would demonstrate that while the trunk was in possession of the bailee its contents were in the possession of the bailor, solely by reason of the fact that the bailor of the trunk retained the key and the bailee did not have access to the trunk. We are of the opinion that the relation of bailee and bailor exists between the appellant and its

lessees, and that the deposit of the securities and valuables by its lessees in rented safety deposit boxes or safes is a bailment, and that the law applicable to bailments, generally, applies to such transaction and to such property.

In *Mayer v. Brensinger*, 180 Ill. 110, the appellee rented from the appellant a safety deposit box in his safety deposit vault, in which he deposited cash. During the illness of the appellee the cash was removed from the box, and suit was brought and a recovery was had. In that case, as in this, the appellee retained the key to the box. The court, on page 113, said: "The relation which the appellant bore to the appellee was that of a bailee or depositary for hire. As such bailee or depositary for hire the appellant was bound to exercise ordinary care and diligence in the preservation of the property entrusted to him by the appellee. Ordinary care in such cases is such care as every prudent man takes of his own goods, and ordinary diligence in the preservation of such goods is such diligence as men of common prudence usually exercise about their own affairs. (*Chicago and Alton Railroad Co. v. Scott*, 42 Ill. 132.) Although one who hires a box in the vaults of a safety deposit company may keep the key himself, yet the company, without any special contract to that effect, will be held to at least ordinary care in keeping the deposit."

In the case of *Lockwood v. Manhattan Storage and Warehouse Co.* 50 N. Y. Supp. 974, it appeared that the defendant, among other things, maintained at its warehouse safe deposit vaults, containing separate safe deposit boxes or safes. Plaintiff had, for a consideration paid, rented a safe deposit box of defendant. One key to the box was held by the plaintiff and one by the defendant. Access to the box could be gained only by the use of said two keys. The plaintiff deposited in her box certain sums of money, which, when she returned some days later, she found had disappeared. Suit was brought to recover the value of

the property abstracted. That defendant was not in the possession of plaintiff's property was urged upon the court. In disposing of the case the court said: "It is urged upon the part of the defendant that it was not the bailee because it was not in possession of the plaintiff's property. If it was not, it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property without the consent and active participation of the defendant. She could not go into her safe unless the defendant used its key first and then allowed her to open the box with her own key, thus absolutely controlling the access of the plaintiff to that which she had deposited within the safe. The vault was the defendant's and was in its custody, and its contents were under the same conditions. As well might it be said that a warehouseman was not in possession of silks in boxes deposited with him as warehouseman because the boxes were nailed up and he had no access to them." See, also, *Cussen v. South California Savings Bank*, 133 Cal. 534; *Roberts v. Safe Deposit Co.* 123 N. Y. 57; *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391.

We think the above authorities clearly sustain the position that the appellant, in law, is in possession of the property of its lessees deposited in the safety deposit boxes or safes which it rents to them, and while it may not have knowledge of the character, amount or quantity of the property which its lessees have deposited in the safety deposit boxes or safes leased from it, nevertheless it is in the legal custody and control of such property. True, while a lessee is living, by the terms of the lease with the appellant he has access to the box or safe, and upon his death the duty devolves upon the appellant to hold the contents of his box or safe and to deliver them to those persons, only, to whom they belong or to whom the law directs they shall be delivered, and such delivery must be made at the appellant's peril. We conclude, therefore, upon the death of a

lessee of a safety deposit box or safe the contents of such box or safe are in the possession and control of the appellant, and the same duty rests upon it as rests upon every other bailee who finds himself in the possession of property that belongs to a bailor who has died during the existence of the bailment,—that is, to deliver the bailment to the party or parties upon whom the law casts the title, with the right of possession. The law is also well settled that the right to take property, either real or personal, by inheritance or by bequest or devise is purely a statutory right and one which rests wholly within legislative enactment, and the State, acting in its sovereign capacity, by appropriate legislation may regulate and control the devolution of property after the death of the owner. (*Evans v. Price*, 118 Ill. 593; *Wunderle v. Wunderle*, 144 id. 40; *Kochersperger v. Drake*, 167 id. 122; *Billings v. People*, 189 id. 472; *In re Estate of Speed*, 216 id. 23; *In re Petition of Mulford*, 217 id. 242; *In re Estate of Graves*, 242 id. 212.) In the *Kochersperger* case, on page 125, the court said: “The laws of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State. The right to inherit and the right to devise being dependent on legislative acts, there is nothing in the constitution of this State which prohibits a change of the law with reference to those subjects at the discretion of the law-making power. The laws of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the State then provides for by the law of descent or devise.” And in the *Graves* case, on page 216, it was said: “The descent of property in this State, whether by inheritance or devise, is regulated entirely by statutory provisions.”

It has been decided by this court that an inheritance tax is a tax upon the right of succession and is not a tax upon the property itself. (*Kochersperger v. Drake, supra; Estate of Merrifield v. People*, 212 Ill. 400.) It is obvious that the money received by the State in the form of inheritance taxes constitutes a part of the public revenue of the State, and by numerous adjudicated cases it has been determined that the right of the State to such taxes is a vested right, and that such right vests, in point of time, at the time the estate vests,—that is, upon the death of the decedent. (*In re Estate of Graves, supra.*) The State, therefore, has a vested financial right in the estate of every decedent in this State which is subject to the payment of an inheritance tax, and that right is equal in degree to that of the personal representative, the heir or devisee of the decedent, and it vests at the same moment of time that the interest of the personal representative, heir or devisee vests. In the *Graves case*, on page 216, this court said: "All the property owned by any person at his decease passes either under the Statute of Descent, to the persons mentioned in that statute, or under the Statute of Wills, to his devisees. In either event it passes subject to the indebtedness of the decedent and the expenses of administration, and to no other charges. The Inheritance Tax law provides that all property so descending, whether under the Statute of Wills or the Statute of Descent, shall be subject to a tax, at certain specified rates, at the fair market value thereof, which shall be due at the death of the decedent. The tax is not upon the estate of the decedent but upon the right of succession, and it accrues at the same time the estate vests,—that is, upon the death of the decedent. Questions may arise as to the persons in whom the title vests, and such questions may affect the amount of the tax and the person whose estate shall be chargeable with it; but when those questions are finally determined their determination relates to the time of the decedent's death. No changes of title,

transfers or agreements of those who succeed to the estate, among themselves or with strangers, can affect the tax. All questions concerning it must be determined as of the date of the decedent's death."

In *Matter of the Estate of Stanford*, 126 Cal. 112, the court had under consideration a statute of the State of California which, in part and in effect, surrendered to the beneficiary all the tax which had accrued in certain cases under a prior law. The constitution of California prohibited the legislature from releasing or extinguishing, in whole or in part, the indebtedness, liability or obligations of any corporation or person to the State. As to estates which had become subject to the tax under the prior law but in which the tax had not been paid, the court held that the amendatory act under consideration was invalid, as infringing the constitutional provision above referred to. The court placed its holding upon the ground that the State, upon the death of the decedent, acquired a vested interest in the tax due the State. Upon that point the court said: "This being so, and the legislature in this case having determined that ninety-five per cent of the decedent's estate may go to his heirs and beneficiaries and that five per cent be retained to the State, it is too clear for argument that this five per cent vested in the State at the same time that the ninety-five per cent vested in the heirs or other beneficiaries. 'An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment.' (Kent's Com. 202.) The State here, from the death of the decedent, has a present fixed right of future enjoyment to the five per cent of his estate. This is property or a thing of value belonging to the State."

It is clear, therefore, that the State has an interest in every estate that is subject to the payment of an inheritance tax, and in all such proceedings the Attorney General, or some other designated officer, is the representative of the

State. (*People v. Sholem*, 238 Ill. 203.) We think, therefore, that the conclusion, from what has been said, logically and necessarily follows that where a lessee of the appellant dies leaving property in one of the safety deposit boxes or safes of the appellant, the State, by its proper representative, has the right to be advised whether or not it shall ultimately be established that it has an interest in such property and of the time when the property will be surrendered and delivered by the appellant to the personal representative, heir or devisee of the decedent, for the purpose of becoming informed as to whether the succession to such property is subject to an inheritance tax. If such were not held to be the law, all moneys, securities or other valuables held by appellant in its safety deposit boxes or safes for its lessees, upon the death of a lessee might be transferred to parties other than the State or its representatives and immediately removed to a foreign State or country or concealed or otherwise disposed of, and the true owner of the property, in part,—that is, the State,—be deprived of all right to enjoy the use and possession of such property. It therefore legitimately follows, we think, that the provisions of section 9 which require the representative of the State to have notice of the time when property held by safety deposit companies, the former owners of which are deceased, is to be surrendered and removed from the custody of the safety deposit company and delivered to the personal representative, heir or devisee of the decedent, are not an unreasonable measure to protect the State from loss of property in which it has a vested right. Neither do we think, as will hereafter be shown, that the appellant or the personal representative, the heir or the legatee of the decedent is deprived of any constitutional right by requiring that the representative of the State be given notice of such surrender and delivery. Nor can we see that the appellant will be deprived of any of its constitutional rights by making it liable for the amount of the inheritance tax

in case it violates the clear mandate of the law and parts with the possession of such property without giving notice to the State of such removal and delivery, or in being penalized for so doing. It is obvious, should doubts arise as to whether an inheritance tax is due on the succession of property held by a safety deposit company whose former owner is dead, or as to the amount of such tax, the courts will always be open, upon the application of the safety deposit company, the State or those interested, to adjudicate upon such questions as may arise and solve the doubt, so that the appellant's expressed fear that it might be wrongfully required to pay an inheritance tax upon property which it had supposedly properly surrendered and delivered, or be penalized for the infraction of the statute and mulcted in costs, is, we think, a groundless fear.

From what has been decided, it follows that it is our view that section 9 of the act of 1909 is a valid enactment so far as it covers property held by a safety deposit company and which had been deposited in a safety deposit box or safe, in a case where the sole lessee of such safety deposit box or safe had died leaving his property in a safety deposit box or safe and in the custody of and under the control of the appellant, it being our view that in consideration of such enactment the appellant has no more right, under the constitution, either State or national, to ignore the property rights of the State and to surrender and deliver property thus situated by turning it over to the personal representative, heir or devisee of the decedent, than it would have to deliver the same to the State to the entire exclusion of the rights of the personal representative, heir or devisee of the deceased. All the parties in interest for whom the appellant, as a safety deposit company, holds property thus situated, are under the law entitled to be informed of the condition and amount of such property so found in safety deposit boxes or safes, before the appellant parts with the possession thereof. This would be the

law which would govern any other bailee under like circumstances if the statute had not been enacted, and we think no valid reason is or can be assigned why such should not be held to be the law in view of said statute governing safety deposit companies.

It is contended by the appellant that even though the constitutionality of section 9 of the act of 1909 should be sustained when applied to property found in a safety deposit box or safe where the sole lessee of such receptacle is dead, it is clearly unconstitutional when applied to property found in a safety deposit box or safe where there are joint lessees and one of the lessees is dead, even though the lessees were not jointly interested in the contents of such safety deposit box or safe and the property was not commingled in the safety deposit box or safe; that the enforcement of the statute would be far more objectionable, on constitutional grounds, where one of two or more lessees was deceased and the property found in a safety deposit box or a safe was owned jointly by the lessees, or where the lease was made by a co-partnership and the property belonged to the co-partnership and one of the co-partners had died and the surviving joint owner or the surviving partner or partners were seeking to have the joint property or co-partnership property surrendered and delivered to such joint owner or surviving partner or partners. As to the case of the death of one of two or more joint lessees, where the property of such joint lessees was deposited in the safety deposit box or safe but the property of the several lessees had not been commingled and the property of the surviving lessee could be readily separated from the property of the deceased lessee, we see no difficulty in the way of the enforcement of the statute. All that would be necessary for the appellant to do to protect the rights of the surviving lessee would be to deliver to him his property and protect the parties representing the deceased by holding the property which belonged to the deceased lessee. If

inconvenience arises it would arise out of the joint relation of the parties, and might as readily arise between the appellant, the surviving lessee and the personal representative or heir of the decedent as between the appellant and the surviving lessee and the State. Whatever inconvenience to the appellant or to the surviving lessee would be caused by the joint occupancy of the safety deposit box or safe would be necessarily an inconvenience which they must have contemplated when they entered into the joint relation, and would, we think, place each of them in a position where they could not object to the owners of the property who succeeded to the rights of the deceased joint lessee (which would include the State) from obtaining their full rights in the property of the deceased lessee found in such safety deposit box or safe. We therefore conclude that there is no constitutional objection to the enforcement of the statute as to property owned jointly by a deceased lessee and another and deposited in a safety deposit box or safe, where the property of the several lessees has not been commingled by the acts of the parties but has been kept separate. We think it can be said that where the property of joint lessees has been commingled or is jointly owned by the lessees, upon the death of one of the joint lessees the parties who succeeded to the rights of the deceased joint lessee (which would include the State) would have the right, as against the appellant and the surviving lessee, to have the amount, character and value of the property deposited jointly in such deposit box or safe determined before the property is surrendered or delivered by the appellant and to have the property belonging to the parties who succeeded to the rights of the deceased lessee valued and determined, and that the appellant and the surviving joint owner who had assisted in creating such joint relation could not complain of the enforcement of the statute, which was enacted for the determination of the rights of the parties (which would include the State) who suc-

ceed, in part, to the rights of such deceased owner. Clearly, when the joint relationship was formed it was known to all joint owners who entered into the relation, as well as to the appellant, that if the death of one of the joint owners intervened before the joint relationship was terminated it would be necessary to determine the question of each joint owner's interest in the property. We think the same course of reasoning which controls where property is found in a safety deposit box or safe which was leased jointly and where the property of each lessee has been kept separate and apart, must, in favor of the State and all others interested in the property, be applied as against the appellant and the joint surviving owner who has commingled his property with a joint lessee who has died, and that the statute can be enforced in the same manner against the appellant and the joint surviving lessee who has voluntarily commingled his property, as against appellant and a joint lessee who has kept his property separate. We therefore hold the act constitutional in the latter as well as the former case.

A more difficult question is presented when the safety deposit box or safe has been leased by a co-partnership and one member of the co-partnership has died leaving co-partnership property remaining in such safety deposit box or safe. We think, however, if it be borne in mind that the co-partnership by the death of a co-partner is dissolved, and that while the assets may be lawfully retained by the surviving member or surviving members of the co-partnership they ultimately must account to the personal representative of the deceased partner for his share and that the inheritance tax will only be assessed upon the succession to what may remain after the partnership debts are paid, it must be held that the statute applies to a co-partnership lease and to co-partnership assets. We can see no objection to the personal representative of the deceased partner, and all other persons who have or will have an interest in

his estate, (which would include the State,) being informed as to the amount, character and value of the co-partnership assets in a leased co-partnership safety deposit box or safe at the time of the dissolution of the partnership by the death of a partner. In the *Graves case, supra*, it was held that while questions may arise as to the persons in whom the title rests, and such questions may affect the amount of the inheritance tax and the persons whose estate shall be chargeable with it, still, when those questions are finally determined, their determination relates back and becomes fixed as of the date of the death of the decedent. It can not be legitimately urged that the true object of the organization of the safety deposit company is to furnish receptacles where parties may secrete their property from the eye of the tax-assessing and tax-collecting officer of the State with a view of escaping taxation, or that when property is found in the possession of a safety deposit company which formerly belonged to a person who has since died or in which he is interested it should not be taxed, and we think no valid reason can be suggested why every person interested in property thus found (which would include the State) has not the right, whether it be held individually or jointly or by a co-partnership, to know the amount, value and kind of such property. When a partnership is dissolved by the death of a partner the law requires the surviving partner or partners to inventory the partnership estate, to have it appraised and to file a list of liabilities,—in short, to make a full showing of the partnership estate. It has never been thought that statutes of that character were unconstitutional by reason of the fact that the surviving partners were required thereby to disclose the partnership assets or spread upon the records of the county court the secrets of the business of the partnership. The whole scope and object of section 9 is to require a disclosure of the assets of the deceased person,—not alone those which are deposited in safety deposit vaults, but such as are held

by trust companies, corporations, banks or other institutions or by any person or persons; and there is no valid reason why, when assets are deposited in the safety deposit boxes or safes of a safety deposit company for safe keeping, the State, and every other person having a property right in such deposit, upon the death of the depositor should not be permitted, at the time such assets are withdrawn from the vaults of the safety deposit company, to be informed of their character, value and amount. We are fully convinced that the statute legitimately places the State in the same position as any other owner in regard to its right to be informed as to the value of the assets of a deceased lessee, and that the right of the State to secure such information rests on valid constitutional grounds.

We will now consider in detail some of the objections which are specifically urged by counsel for the appellant against the constitutionality of section 9.

It is first contended that the section impairs the obligation of the charter of the appellant. The charter of the appellant, which is its contract with the State, provides that it is organized "for the express purpose of providing a suitable building or buildings with vaults and safes, with a special regard to protection against loss by fire, robbery or otherwise, and to carry on the business of safety deposit and storage." In pursuance of its corporate powers it has provided a building and entered upon the business of renting safety deposit boxes and safes, and we are unable to ascertain wherein section 9 impairs, takes from or infringes any of the powers of the appellant granted to it by its charter. Section 9 in no way deprives the appellant of the right of constructing or renting a building, vaults, etc., or of renting its safety deposit boxes or safes, or deprives it of its right to act as a depository for hire and to receive and accept for deposit all securities or other valuables which may be delivered to it by its lessees, or prevents it from delivering to the rightful owner or owners

of or persons entitled to all or any of such securities or other valuables as may have been delivered to it, upon the termination of the relation which is created between it and its lessees. The utmost that can be said is, that upon the termination of the relation which has been created between the appellant and a lessee by the death of such lessee, it cannot part with the possession of or surrender the securities or other valuables which have been placed in its safety deposit box or safe without pursuing the method contained in section 9, to the end that if there is due upon the succession of the property deposited with it an inheritance tax, the amount of such inheritance tax may first be determined and collected. The law has always been that a bailee must deliver the bailment to the person to whom it belongs, upon the termination of the contract of bailment, and all the legislature has done is to pass a statute which vests the State with an interest in the estate of a deceased person which is subject to an inheritance tax, and which provides that where the bailment is terminated by the death of the lessee and the property is to be surrendered by the safety deposit company, the State shall be treated as a part owner of such bailment and receive notice, through its appropriate officer, of the proposed surrender, to the end that it may receive and be paid its proper proportion of the property so deposited with appellant. This, as has heretofore been determined, is not an unreasonable or unconstitutional regulation. That the State has the right to modify, regulate or impose conditions upon the right of succession, by inheritance or by will, to property which was owned by a person who has died there can be no question. (*In re Estate of Speed, supra.*) The right to take property in pursuance of descent or will is wholly statutory, and that such right may be changed by the legislature is unquestioned. (*Kochersperger v. Drake, supra; In re Estate of Speed, supra; In re Petition of Mulford, supra.*) The right to bequeath or devise property by will or to take by inherit-

ance can be enjoyed only because such right is conferred by statute. (*Evans v. Price, supra; Wunderle v. Wunderle, supra.*) The proposition that the State has the right to provide for an inheritance tax and to levy the tax upon the right of the succession to property, and to provide that the State shall take a vested interest in the estate immediately upon the death of the deceased, has become in this State axiomatic. We do not think, therefore, that a law which, in fact, only requires that the appellant shall not, without notice to the State, deliver the property which it has received into its vaults where the owner or part owner of such property has died since its receipt by the appellant, and, if it is subject to an inheritance tax, not deliver the same, without the consent of the State, until the tax is paid, can rightfully be said to infringe upon the charter rights of the appellant.

It is also contended that the appellant is deprived of property and liberty without due process of law, and that it is deprived of the due protection of the law, by said section 9. Having heretofore reached the conclusion that a safety deposit company is in possession and control of the securities and other valuables delivered to it by its lessees, and that the relation of bailee and bailor exists between the safety deposit company and its lessee, and that upon the contingency of the death of a lessee who is an owner, in whole or in part, of property in the possession of the safety deposit company the safety deposit company may rightfully hold such deposit, and must hold it, until it can deliver it to the true owner, and that the State is a part owner of the deposit in case it is subject to the payment of an inheritance tax, we think by the terms of section 9 the appellant's right of contract is not infringed upon and that it is not deprived of liberty, property or the due protection of the law,—in short, that section 9 provides first for the determination of the question, Is the property sub-

ject to an inheritance tax?—and if it is, that it must be paid before the appellant can rightfully part with the possession of the property. In this connection the objection to the statute that the appellant is made a trustee and tax gatherer without its consent may be considered, and the answer to these propositions will, we think, demonstrate the fallacy of the argument that the appellant has been deprived, by the statute, of liberty, property and the due protection of the law.

The appellant is not a trustee in the ordinary sense, but a bailee, and the fact, if it were a fact, that it is used, in part, as a tax-assessing and tax-collecting officer would not invalidate the statute. Numerous statutes have been passed by the legislatures of this and other States which require banks, trustees, executors, administrators and agents to return for taxation property in their possession, and such statutes frequently provide that if the banks, trustees, executors, administrators and agents holding such property surrender the same without the tax thereon being paid, they shall be liable for the tax. (*Walton v. Westwood*, 73 Ill. 125; *Ottawa Glass Co. v. McCaleb*, 81 id. 556; *Lockwood v. Johnson*, 106 id. 334; *Warren v. Cook*, 116 id. 199; *People's Loan and Homestead Ass'n v. Keith*, 153 id. 609; *Scott v. People*, 210 id. 594.) In many instances the corporations have been made collecting officers by being required to deduct the taxes from the stockholders' interests and pay them over to the State. (*Haight v. Pittsburg, Ft. Wayne and Chicago Railroad Co.* 73 U. S. 15; *United States v. Baltimore and Ohio Railroad Co.* 84 id. 322; *National Bank v. Commonwealth*, 76 id. 353; *Minot v. Philadelphia, W. & B. R. R. Co.* 85 id. 230; *Maltby v. Reading & C. R. R. Co.* 52 Pa. 140.) In *Citizens' Nat. Bank v. Kentucky*, 217 U. S. 443, the revenue law of Kentucky, which charged the banks with the duty of collecting the taxes on shares, was sustained. Mr. Cooley, in his work

on Taxation, (vol. 2, 3d ed. p. 832,) in discussing this subject, says: "For the most part, the taxes levied by the State are collected of the persons taxed or enforced against the property in respect to which they are imposed. In a few cases, however, in which such a course could not work injustice, the State may reach the party taxed by indirection, and collect, in the first instance, from someone else, who in turn will become collector from the person on which the tax is really imposed. The reason for this is, that in such cases it is more convenient to the State and perhaps makes more certain the collection, and it could be resorted to only when the case is such that injustice could result to no one. A case of the kind is where a tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, or upon the interest paid by indebted corporations, and where the corporation is required to make the payment, which it would then deduct from the payment to be made to shareholders or to the holders of the evidences of indebtedness. There is no doubt of the right to do this, except as to payments to be made to non-residents, nor even as to them if the statute under which their interests were acquired provided for the levying and collecting of taxes in that manner. Other instances are, where a tax is required under a lease, the amount of which tax may be deducted from the rent, or where the person having the custody of distilled spirits is obliged to pay the tax thereon, he being given a lien on them for what he so pays." We conclude the appellant is not deprived of its liberty, property or due protection of the law or wrongfully made a trustee or tax-gathering agent against its will.

It is also urged that the property of the lessees of appellant is subject to unreasonable searches and seizures. In the case of *People ex rel. Natch v. Reardon*, 184 N. Y. 431, and *People ex rel. Ferguson v. Reardon*, 197 id. 236,

the constitutionality of a statute was sustained which required the transferee of corporate stocks to keep a record of such transfer or transfers for the information of the tax-levying and tax-gathering officers, and in the corporation tax cases (*Flint v. Stone-Tracy Co.* 31 Sup. Ct. Rep. 343,) the Supreme Court of the United States sustained the constitutionality of a statute which required the corporations which fell within the purview of the statute then under consideration to keep a record for the inspection of the revenue officer which showed the net income of such corporations. In the *Flint case*, Mr. Justice Day, who spoke for the court, in the course of his opinion (p. 358) said: "It is urged in a number of the cases that in a certain feature of the statute there is a violation of the fourth amendment of the constitution, protecting against unreasonable searches and seizures. This amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. (*Boyd v. United States*, 116 U. S. 632; 29 L. ed. 751; 6 Sup. Ct. Rep. 524.) It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. (*Adams v. New York*, 192 U. S. 585; 48 L. ed. 575; 24 Sup. Ct. Rep. 372.) It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc. (*Inter-State Commerce Commission v. Brimson*, 154 U. S. 447; 38 L. ed. 1047; 4 Int. Com. Rep. 545; 14 Sup. Ct. Rep. 1125; *Inter-State Commerce Commission v. Baird*, 194 U. S. 25; 48 L. ed. 860; 24 Sup. Ct. Rep. 563.) Certainly, the amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the States, of requiring tax returns to be made, often under oath." In the cases heretofore referred

to, the assessed corporations or individuals were required to keep a record for the information of the tax-assessing and tax-collecting officers, while the statute under consideration here requires only that notice be given, and that the representative of the State be permitted to be present at the time the property is surrendered. The representative of the State, in this instance, gets the information first hand, while in the instances covered by the *Reardon* and *Flint cases* the tax officers obtained the information from a record which those statutes required to be kept for their information. If the legislature or Congress may require such record to be kept, we see no reason why the information, which is the important thing, may not be required to be given direct to the tax officer.

It is finally contended that the property of the appellant and its lessees is devoted to a public use without just compensation, in this: that it is held pending the notice to the officers of the State required by the statute and pending the time of the determination by such officers of the liability to the succession of the property to be subjected to an inheritance tax. If the required notice is lawful and the determination of the question whether the succession to the property in the possession of the safety deposit company is subject to the payment of an inheritance tax is proper, then there is no infringement upon the constitutional provision, either State or national, which forbids property to be taken for public use without just compensation. In the very nature of things, in the settlement of estates of deceased persons there must be some delay in determining who is entitled to receive the estate, and as we have heretofore held, when the appellant leases its safety deposit boxes and safes, it and its lessees must necessarily have contracted with reference to the inevitable fact that some of its lessees will die pending the continuation of their leases. This being true, we think it manifestly fol-

lows that appellant's leases are made and the rent therefor is fixed upon the contingency that in case of the death of a lessee pending the lease there will be some delay in the delivery of the property of the lessee to the true owner by the appellant. The only damage that the appellant could incur in such cases would be the loss of box or safe rent during the time of said delay, which, upon a safety deposit box or safe which rents for five dollars a year, would be inconsiderable, and we must conclude, as to the appellant, that the question of box rent or safe rent is a matter that was taken into consideration when the lease was executed. As the lessee is dead, he clearly will be deprived of nothing by reason of such delay. Those persons who are to succeed to his estate take what they get only by force of the Statute of Descent and Statute of Wills, and as the inheritance or bequest which they receive comes to them burdened with the inheritance tax which the law places upon their right of succession, they necessarily take their inheritance or bequest subject to the costs, expenses and damages accruing out of the delays which must intervene before they may enjoy their inheritance or bequest. We therefore conclude that neither the appellant nor its lessees are, within the meaning of the law, deprived of property for a public use without just compensation.

We have given this case the patient care which its importance demands, and have reached the conclusion that section 9 of the Inheritance Tax law of 1909 is a valid and constitutional enactment.

The decree of the circuit court will be affirmed.

Decree affirmed.

FARMER, VICKERS and COOKE, JJ., dissenting.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, *vs.* THE LEWY BROS. COMPANY, Plaintiff in Error.—SAME *vs.* CAHN, BLOCK & CO.—SAME *vs.* STRAUS & SCHRAM.

Opinion filed June 20, 1911—Rehearing denied October 4, 1911.

TAXES—*capital stock of a mercantile corporation should be assessed by the local assessor.* The capital stock of a mercantile corporation is property and should be assessed for taxation, but as section 108 of the Revenue act, as amended in 1905, expressly prohibits the assessment of the capital stock of such corporations by the State Board of Equalization the assessment must be made by the local assessor, and the State board has no power to make the assessment even though the local assessor does not do so. (*People v. National Box Co.* 248 Ill. 141, followed.)

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

LOUIS J. BEHAN, for plaintiffs in error.

GUSTAVUS J. TATGE, County Attorney, and WILLIAM F. STRUCKMANN, for the People.

Mr. JUSTICE FARMER delivered the opinion of the court:

Separate suits were brought in the municipal court of the city of Chicago in the name of the People against the Lewy Bros. Company, Cahn, Block & Co. and Straus & Schram, mercantile corporations organized under the laws of Illinois, to recover the personal property taxes assessed against said corporations, respectively, for the year 1909. In the Lewy Bros. Company suit the tax sought to be recovered consisted of three items, viz.: First, a tax upon tangible personal property, amounting to \$298.01, based upon an assessment of tangible property by the board of assessors; second, a tax of \$223.50 based upon an assessment of the capital stock of the corporation made by the State Board of Equalization; and third, another tax of

\$521.52 based upon an assessment of the same capital stock of the corporation made by the board of assessors. The first item is conceded to be a valid tax and there is no dispute as to it. The municipal court rendered judgment in favor of the People for all three of the items, but it is agreed judgment should not have been rendered for both items of taxes based upon an assessment of the capital stock of the corporation, and that either the assessment of the capital stock by the State Board of Equalization or by the board of assessors was illegal. The suit against Cahn, Block & Co. was for taxes amounting to \$509.58, which consisted of two items, viz.: First, a tax upon the corporation's tangible property of \$286.08 based upon an assessment made by the local assessors; and second, a tax of \$223.50 based upon an assessment of the corporation's capital stock made by the State Board of Equalization. Judgment was rendered for plaintiff below for both taxes. In the suit against Straus & Schram judgment was rendered against the corporation for \$441.90 taxes, which consisted of two items, viz.: First, a tax of \$196.40 based upon a tangible property assessment; and second, a tax of \$225.50 based upon a capital stock assessment made by the State Board of Equalization. Each of said corporations sued out a separate writ of error to review said judgments, but except as to the double capital stock tax in the Lewy Bros. Company case the questions involved in all three of the cases are the same and the three cases will be disposed of in one opinion.

No question of the validity of the tax based upon the tangible property assessment is raised in either of these cases, and the right of the People to a judgment for the amount based on that assessment against each of said corporations is not disputed. In all three of the cases judgment for the tax based upon the capital stock assessment made by the State Board of Equalization is resisted on the ground that the State Board of Equalization did not deduct

from the assessed value of the capital stock and franchises of the corporations the assessed value of their tangible property as made by the local assessors, in accordance with clause 4 of section 3 of the Revenue act. Any discussion of this question is unnecessary in view of the recent decision in *People v. National Box Co.* 248 Ill. 141. In that case it was held that as the capital stock of a corporation is property, and taxable, it must be assessed for taxation, but as section 108 of chapter 120 of Hurd's Statutes of 1909 expressly prohibits the State Board of Equalization from assessing the capital stock of corporations of the character of the plaintiffs in error, the assessment of their capital stock should be made by the local assessor. It follows, therefore, that the court erred in rendering judgment against each of plaintiffs in error for the tax based upon the capital stock assessment made by the State Board of Equalization. The judgment against the Lewy Bros. Company should have been for the amount of the tangible property tax and the capital stock tax based upon the assessment of capital stock made by the board of assessors. The judgments against Cahn, Block & Co. and Straus & Schram should have been for the amount of the tax against them, respectively, based upon the tangible property assessment. No assessment of their capital stock was made by the board of assessors, and as the State Board of Equalization had no authority to assess their capital stock, the assessment made by that body is invalid.

The judgment in each case will therefore be reversed and the cases remanded to the municipal court, with directions to that court to render judgment in each case as directed in this opinion.

Reversed and remanded, with directions.

JAMES D. WALLACE, Defendant in Error, *vs.* MABEL H. FOXWELL, *et al.*—(THE SECOND NATIONAL BANK OF ST. PAUL, Plaintiff in Error.)

Opinion filed June 20, 1911—Rehearing denied October 4, 1911.

1. TRUSTS—*when power cannot be executed by surviving trustee.* Where the power conferred upon trustees is a mere naked power or rests in personal confidence in the trustees it cannot be executed by the surviving trustee alone.

2. SAME—*nature of power conferred by will depends upon the intention of the testator.* The nature of a power conferred upon trustees by a will is to be determined from a consideration of the purpose and intent of the testator appearing from an examination of the entire will.

3. SAME—*what indicates that testator did not intend to limit execution of powers to the trustees named.* The fact that the will creating a trust confers upon the successors in trust the same powers conferred upon the named trustees and that the will does not name such successors or prescribe how they shall be appointed, indicates that it was not the intention of the testator to limit the execution of the powers to the trustees named, particularly where the powers conferred are those attaching to the office of a trustee rather than those conferred by reason of personal confidence.

4. SAME—*a survivor may execute a power coupled with an interest.* Although discretionary power is vested in two or more persons as trustees, if the power is coupled with an interest the interest survives upon the death of one trustee, and the power also survives and may be executed by the survivor or survivors.

5. SAME—*when power of trustee is coupled with an interest.* Where the legal title to real and personal property is vested in trustees, with power to sell and convey, invest the proceeds, manage the estate and pay the income to persons designated, there is a power coupled with an interest, and in such case the surviving trustee takes the estate with the duty annexed to the power and may execute the power.

6. WILLS—*courts will consider will in light of facts surrounding testator.* In construing a will courts will endeavor to read its provisions in the sense intended by the testator, and for that purpose will consider the will in the light of the facts and circumstances surrounding the testator at the time the will was made.

7. SAME—*what is not necessary to creation of spendthrift trust.* To constitute a valid spendthrift trust it is not necessary that the

will shall specifically provide that the income shall not be subject to the debts of the *cestui que trust*, and it is sufficient if the will, considered in the light of the facts and circumstances, discloses an intention on the part of the testator to provide for the support of his child and secure the fund against his improvidence.

8. SAME—*law does not prohibit creation of a spendthrift trust.* The rule that the law favors the vesting of estates cannot be permitted to defeat the intention of the testator to the contrary, and if it is clear that the testator intended to create a spendthrift trust it is the duty of the courts to give effect to such intention.

9. SAME—*what circumstances indicate an intention to create a spendthrift trust.* The facts that the testator, in dividing his estate, made a distinction between his daughter and his son, directing the trustees to pay her share of the income to her alone, whereas they were authorized to pay the son's share to him or his wife in such proportions as they deemed best, and that they were given discretion to convey one-half of the estate to the son if they deemed advisable, indicate an intention to create a spendthrift trust in favor of the son, who at the time the will was made was married and had one child, had been unsuccessful in business and was indebted in a large sum.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. GEORGE A. DUPUY, Judge, presiding.

Defendant in error, James D. Wallace, as trustee, filed a bill in the superior court of Cook county, at the November term, 1909, to construe the last will and testament of Samuel G. Spaulding, deceased. The bill alleged that Samuel G. Spaulding departed this life on or about the 5th day of September, 1893, leaving a last will and testament, as follows:

"I, Samuel G. Spaulding, of the city of Chicago, in the county of Cook and State of Illinois, being of sound mind and memory, do make and declare this my last will and testament, hereby revoking all former wills by me made.

"I will that all my just debts and funeral expenses be paid.

"I give, devise and bequeath unto Clarence W. Marks and James D. Wallace, and to their successors in trust, all my estate, both real, personal and mixed, of whatever kind and wherever situate, to be held by them in trust for the uses and purposes hereinafter named and designated, in trust:

*"First—*To enter upon any and all my real estate, to collect the rents and profits and to have the entire management and control of the same; to reduce to possession, to receive and collect any and all bonds, notes, money, mortgages, stocks and other evidence of indebtedness due me, with the interest on the same; to convert the same into cash, at their discretion; to re-invest and re-sell the same in such manner as may seem best to them, but not to invest the same upon mere personal security or upon second mortgage security; to sell and convey, by good and sufficient deed, any and all my real estate; to re-invest and re-sell the proceeds of such sale, but not to invest the same upon mere personal security, but upon first mortgage security on real estate, or in stocks or bonds, or in real estate, as may seem best to them.

*"Second—*To pay over to my wife, Marcia I. Spaulding, the entire net income of my estate during her lifetime.

*"Third—*Upon the decease of my said wife, Marcia I. Spaulding, to pay over to my daughter, Mabel H. Foxwell, one-half of the net income of my estate during her lifetime, and upon the decease of my said daughter, Mabel H. Foxwell, to convey one-half of my estate to the right heirs of my said daughter.

*"Fourth—*Upon the decease of my said wife, Marcia I. Spaulding, to pay over to my son, Howard H. Spaulding, and to his wife, Florence B. Spaulding, one-half of the net income of my estate in such proportions as they may see fit, paying more or less to the one or the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding.

*"Fifth—*To convey to my son, Howard H. Spaulding, after the decease of my wife, Marcia I. Spaulding, one-half of my estate at such time as may seem best for them to do so.

"I hereby appoint Clarence W. Marks and James D. Wallace executors of this my last will and testament, and request that no bond be required of them for the faithful performance of their duties as such executors.

"In witness whereof I have hereunto set my hand this seventh day of August, A. D. 1893.

SAMUEL G. SPAULDING."

The bill alleged that said will was admitted to probate and letters testamentary issued to complainant and Clarence W. Marks, as executors; that the said executors duly qualified and entered upon the discharge of their duties; that afterwards said Clarence W. Marks refused to act as trustee under said will, and on December 1, 1896, by decree of the circuit court of Cook county, Marcia I. Spauld-

ing, the widow of testator, was appointed a co-trustee to act with the complainant, with full power and authority to carry out the terms and provisions of said will, as successor to said Clarence W. Marks. The bill alleged that on December 11, 1896, complainant and Clarence W. Marks filed their final report and account as executors, which were duly approved and said executors discharged; that upon the discharge of said executors complainant and Marcia I. Spaulding took charge of the estate and acted as trustees under said will until on or about the 26th day of March, 1909, when the said Marcia I. Spaulding died, since which time complainant has acted, and continues to act, as the sole surviving trustee under said will. The bill alleged that complainant has collected the rents under said trusteeship, has invested the same, and has accounted to and paid over the income to the said Marcia I. Spaulding during her lifetime; that since the death of said Marcia I. Spaulding complainant has accounted to Mabel H. Foxwell for one-half of the net income from said estate and that he has elected to pay to Florence B. Spaulding the other half of the net income. The bill further alleged that on the 19th day of April, 1899, the said Howard H. Spaulding filed his petition in bankruptcy in the United States District Court for the Northern District of Illinois; that he was adjudged a bankrupt and on July 26, 1899, was discharged as such; that in the schedule filed in the bankruptcy proceedings the provisions of the will of Samuel G. Spaulding, deceased, concerning the interest of said Howard H. Spaulding, were set out, followed by the statement, "Petitioner is advised that he has no interest in the trust estate or any part thereof." The bill alleged that the State Bank of Chicago was appointed trustee in bankruptcy, and filed a petition to sell all the right, title and interest of said Howard H. Spaulding under and by virtue of said will, and that said sale was made and confirmed; that S. R. Flynn purchased the interest of Howard H. Spaulding under said will and afterwards con-

veyed the same to the Second National Bank of St. Paul. The bill further alleged that said Samuel G. Spaulding left surviving him his widow, Marcia I. Spaulding, (now deceased,) his son, Howard H. Spaulding, and his daughter, Mabel H. Foxwell, as his only heirs-at-law; that the said Mabel H. Foxwell is a widow and has one child, Frances Foxwell; that said Howard H. Spaulding and his wife, Florence B. Spaulding, have two children, Lester Carter Spaulding and Howard Henry Spaulding, Jr., both minors; that the said Marcia I. Spaulding died March 26, 1909, and that Howard H. Spaulding has been appointed executor of her estate. The bill alleged that the Second National Bank of St. Paul claims an interest in said estate, and prays that the will may be construed and the interests and rights of the various parties in and to said estate be determined and that said trustee be directed concerning his rights, powers and duties in the premises.

The answer of Mabel H. and Frances Foxwell admits all the allegations of the bill but denies that there is any necessity for construing the will and denies that they should be charged with any costs and attorneys' fees.

The answer of the Second National Bank of St. Paul sets forth the proceedings in bankruptcy, the sale of the interest of Howard H. Spaulding in said estate, the purchase by S. R. Flynn and the transfer of the same by Flynn to the Second National Bank of St. Paul. The answer neither admits nor denies that the complainant has elected to pay over to Florence B. Spaulding one-half the net income of the estate of Samuel G. Spaulding, deceased, since the death of Marcia I. Spaulding, but denies that he has the power to make such election under the provisions of the will. The answer sets up that by virtue of the fifth clause of said will, immediately upon the death of the testator there vested in said Howard H. Spaulding an equitable estate in fee of one-half of all the residue of the real and personal estate of the said testator, subject only to the

equitable life estate of Marcia I. Spaulding, and that anything in the fourth clause conflicting with that interpretation is void; that by virtue of the bankruptcy proceedings and sale and conveyance said bank now is the sole owner of all the right, title and interest which passed to the said Howard H. Spaulding under and by virtue of said will.

The answer of Howard H. Spaulding, individually and as executor of the last will and testament of Marcia I. Spaulding, and of Florence B. Spaulding, admits substantially all the allegations of the bill but denies that it is necessary to construe the will, and further denies that the Second National Bank of St. Paul has any right, title or interest in or to the estate of Samuel G. Spaulding, deceased, or any part thereof.

A formal answer was filed by James H. Wilkerson, who was appointed guardian *ad litem* of Lester Carter Spaulding and Howard Henry Spaulding, Jr., minors.

A hearing was had upon the bill, answers and replications, and a decree was entered July 14, 1910, finding that James D. Wallace is now, and has been for a long time past, the duly authorized and acting trustee under said will of Samuel G. Spaulding, deceased, and that he has full authority to execute the powers conferred by the will; that the title to the property held in trust for the benefit of Howard vested in the trustees; that the provision made for said Howard was intended by the testator as, and is in law, a spendthrift trust; that neither Howard nor plaintiff in error has, or ever had, any vested interest in the property in the hands of the trustee, and that no right or estate therein passed to the trustee in bankruptcy or to the purchaser at the bankrupt sale or to plaintiff in error. The decree also found that there is no repugnancy between the fourth and fifth paragraphs of the will. To reverse this decree a writ of error has been sued out of this court by the Second National Bank of St. Paul.

ROSENTHAL & HAMILL, (CHARLES H. HAMILL, and NICHOLAS R. JONES, of counsel,) for plaintiff in error.

PAUL BROWN, and WILLIAM H. GRUVER, for defendant in error.

TENNEY, COFFEEN, HARDING & SHERMAN, for Howard H. Spaulding *et al.*; WILKERSON & CASSELS, for Lester C. Spaulding and Howard H. Spaulding, minors, and James H. Wilkerson, guardian *ad litem*.

Mr. JUSTICE FARMER delivered the opinion of the court :

Plaintiff in error has furnished us with an elaborate and learned brief and argument in support of the proposition that the discretionary power conferred by the will upon the trustees indicated personal confidence in the donees and the power could not be exercised by one of the trustees alone, and that upon the death of one of the trustees the power lapsed. It is also contended by plaintiff in error that, considering the fourth paragraph of the will separately, Howard took an equitable freehold estate, and the fee being limited to his heirs, the rule in *Shelley's case* applies, and Howard took an equitable remainder in fee in the real estate and an equitable estate in one-half the personalty during his life, with remainder in fee in the personalty to such persons as shall be Howard's heirs at the time of his death. It is further contended that, considering the fifth paragraph independently of the fourth, it vests in Howard a remainder in fee, and if the fourth paragraph cannot be given the construction contended for, then the fourth and fifth paragraphs are repugnant and the fifth must prevail, and (assuming the power of the trustees to appoint having lapsed) plaintiff in error having succeeded to Howard's rights, is entitled to a conveyance of one-half of the estate, both real and personal.

Under the construction we place upon the will it will be unnecessary to pass upon all the questions raised growing out of other possible constructions of that instrument. We will first consider the contention that one of the trustees having declined to accept the trust, and having since died, the power conferred did not vest in the survivor but lapsed.

If the power was a mere naked power or rested in personal confidence in the donees, then, according to the authorities, it could not be executed by a survivor. The nature of the power is to be determined from a consideration of the purpose and intent of the testator appearing from an examination of the entire will. While certain discretionary powers were conferred upon the trustees, it does not appear to have been the intention of the testator to limit the execution of the powers to the persons named as trustees, for the will confers the same powers upon their successors in trust. Who should be successors and how such successors should be appointed is not provided for in the will. The reasonable inference, we think, is, that the testator had in mind the possible death of one or both of the trustees named in the will before the trusts were terminated, and intended, in the event of the death of both, that the successor named should have authority to execute the powers conferred. The powers conferred were powers attaching to the office of trustees rather than powers conferred in personal confidence in the donees. Furthermore, the power given by the will is not a mere naked power but is a power coupled with an interest, and the rule in such cases is, that although discretionary power is vested in two or more persons as trustees, if the power is coupled with an interest the interest survives, and therefore the power survives and may be executed by the survivor. The legal title vested in the trustees with power to sell and convey, invest the proceeds, manage the estate and pay the income to the persons designated. The power was therefore coupled

with an interest. (*White v. Glover*, 59 Ill. 459; *Peter v. Beverly*, 10 Pet. 532; *Osgood v. Franklin*, 2 Johns. Ch. 1; 7 Am. Dec. 513.) In such cases a surviving trustee takes the estate with the duty annexed to the power and may execute the power. (Perry on Trusts,—6th ed.—sec. 505; Lewin on Trusts,—11th ed.—pp. 746, 747; *Peter v. Beverly*, *supra*; *Lorings v. Marsh*, 6 Wall. 337.) *French v. Northern Trust Co.* 197 Ill. 30, is not in conflict with this view.

If the decree of the chancellor is correct that it was the intention of the testator to, and that his will does, create a spendthrift trust in favor of Howard and his family, it follows that no estate vested in Howard and the rule in other cases has no application. It is very ably contended by plaintiff in error that the decree in this respect is erroneous.

Whatever of hostility there may be on the part of some courts to spendthrift trusts, their validity has been repeatedly approved by this and many other courts. The oft-repeated cardinal rule that it is the intention of the testator that must govern in the construction of a will, and in determining the intention the whole will and all its provisions must be considered and given effect, if possible, does not require the citation of authority. It is also a familiar rule that in the construction of wills courts will endeavor to read their provisions in the sense intended by the testator, and for that purpose the court may consider a will in the light of the facts and circumstances surrounding the testator at the time the will was made. (*Perry v. Bowman*, 151 Ill. 25; *Wallace v. Noland*, 246 id. 535.) Construing this will in the light of these rules, we are of the opinion the decree of the chancellor is correct.

The proof shows the will was executed in August, 1893, and the testator died in September following. At the time the will was executed, and at the time of his death, the testator owned real estate of the value of \$52,000 and personal property of the value of \$93,000. He left surviving

him his widow, Marcia I. Spaulding, a daughter, Mabel H. Foxwell, and a son, Howard H. Spaulding, as his only heirs-at-law. At the time the will was executed Howard was twenty-nine years old, was married and had one child. He had been unsuccessful in business, was indebted in the sum of \$48,000, upon a part of which judgment had been rendered against him in the circuit court of Cook county. All these things were known to the testator when he executed his will. He devised to the trustees named, and to their successors in trust, his entire estate, real and personal, with power to sell and convey the real estate, collect the rents and profits, to collect and reduce to possession all moneys owing to the testator, to re-invest the same and pay to the widow the entire net income during her life. Upon her death one-half the net income was directed to be paid to Mabel H. Foxwell during her life, and upon her death one-half of the estate was to be conveyed to her "right heirs." By the fourth paragraph, after the death of the widow one-half the net income from the estate was directed to be paid to Howard and his wife, Florence, "in such proportions as they [the trustees] may see fit, paying more or less to the one or the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding." The fifth paragraph is as follows: "To convey to my son, Howard H. Spaulding, after the decease of my wife, Marcia I. Spaulding, one-half of my estate at such time as may seem best for them to do so."

We are of opinion that, properly read and construed, there is no repugnancy in the will. No particular significance is to be attached to the numbering of paragraphs 4 and 5. The evident meaning and purpose of the testator was to provide for the payment of the income from one-half of his estate, after the death of his widow, to Howard and wife until the death of Howard, with authority in

the trustees to terminate the trust by conveying the estate to Howard during his lifetime, if the trustees thought it best to do so. If it was thought unwise to make the conveyance to Howard the trustees could retain the property and pay the income to Howard and his wife in such proportions as they deemed best to carry out the purpose of the testator until Howard's death. For some reason the testator saw fit to make a distinction between the devise for the daughter's benefit and that for the benefit of the son. In the provision made for the son's benefit he was given the right to no definite portion of the income, but it was left to the trustees to determine whether he should receive the greater part or half the income, or whether it should substantially all be paid to his wife. The proof shows the trustee elected to pay the entire income to the wife of Howard. The reason for the difference in the provisions made for the daughter and the son is not set out in the will itself, but, as we have seen, we are not confined to the written words of the will, alone, in determining the intention of the testator. Considering, in connection with the will, the financial condition of Howard, which was known to his father, and the fact that Howard was a married man twenty-nine years old and then had one child, we find reasons why the testator might have desired to conserve the property by placing it beyond the reach of Howard's creditors and leaving it so his family might receive the income from it. The language used in the will is apt language to effect that purpose and such purpose is not prohibited by any rule of law. It appears to us there is no escape from the conclusion that for reasons personal to Howard the testator intended that no estate should vest in him, and such intention will be given effect. (*Dee v. Dee*, 212 Ill. 338; *Armstrong v. Barber*, 239 id. 389.) True, the law favors the vesting of estates, but this rule will not be permitted to defeat the intention of the testator. To constitute a valid spendthrift trust it is not necessary that the will should specifically provide that

the income shall not be subject to the payment of the debts and liabilities of the *cestui que trust*. It is sufficient if the will, considered as a whole and viewed in the light of the circumstances under which it was made, discloses an intention on the part of the testator to provide for the support and maintenance of his child and to secure the fund against his improvidence. The testator had a legal right to dispose of his property in this manner if he desired to do so, and if such was his intention, as appears from the will, it is the duty of the court to give effect to such intention.

The validity of a spendthrift trust was before this court the first time in *Steib v. Whitehead*, 111 Ill. 247. In that case the court referred to conflicting authorities upon the subject, and decided to follow those holding valid, provisions giving, through a trustee, the net income from property to a child of a testator and at the same time placing it beyond the control of the beneficiary's creditors. The court said that view was in accordance with its convictions of right and a sound public policy.

In *Bennett v. Bennett*, 217 Ill. 434, there was a bequest of \$3000 to a trustee to invest and pay the interest semi-annually to the testator's son until he was forty years old, at which time, if the testator's widow was living, the said \$3000 was to be paid to and become the property of the son absolutely, but if the widow was not then living, the trustee was to retain the principal sum and continue to pay the interest to the son until he was fifty years old, at which time the \$3000 was to be paid to him if living, and in case of the son's death before payment to him of said principal sum it was to go to his heirs. The court held no title to the \$3000 vested in the son of the testator until the period arrived at which the trustee was to pay it to him, and said (p. 442): "In determining the character of the trust here created, whether a spendthrift trust or not, we may look to the provisions of the will and the condition of the parties as disclosed by the bill. (*Kaufman v. Breckinridge*, 117

Ill. 305.) It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary or *in invitum* by his creditors. 'It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances.' (26 Am. & Eng. Ency. of Law,—2d ed.—p. 141; *Stambaugh's Estate*, 135 Pa. St. 585; *Appeal of Grothe*, 19 Atl. Rep. 1058; *Baker v. Brown*, 146 Mass. 369; 15 N. E. Rep. 783; *Patten v. Herring*, 29 S. W. Rep. 388.) The fact that a trustee was appointed and vested with the estate and the beneficiary was given the income, only, is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred.—*Stambaugh's Estate, supra.*"

In *Wagner v. Wagner*, 244 Ill. 101, the subject of spendthrift trusts was again considered, and the court, on page 111, quoted with approval from the American and English Encyclopedia of Law, (vol. 26, p. 138): "'Spendthrift trust' is the term commonly applied to those trusts that are created with a view of providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity, for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or *in invitum* by his creditors, are the usual incidents of such trusts." And further said: "Such trusts are now generally recognized as valid by the courts of this country, and have been sustained by this court in *Steib v. Whitehead*, 111 Ill. 247, *Bennett v. Bennett*, 217 id. 434, *King v. King*, 168 id. 273, and *Chapman v. Cheney*, 191 id. 574. To create a valid spendthrift trust it is not necessary that the *cestui que trust* should be denominated a spendthrift in the will or that the

testator should give his reasons for the creation of it, nor is it necessary that the will shall in express terms contain all the restrictions and qualifications incident to such trusts. If, upon a consideration of the will, it appears the intention of the testator was to create such a trust, effect will be given to that intention.—*Baker v. Brown*, 146 Mass. 369; *Bennett v. Bennett, supra*."

In our opinion the provisions of the will for Howard's benefit were intended to, and did, constitute a spendthrift trust within the meaning of the law as held in the decisions above referred to. It necessarily follows, therefore, that plaintiff in error acquired no title by virtue of the bankruptcy sale, and the decree of the superior court is affirmed.

Decree affirmed.



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